Supreme Court, U.S.

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No. _____ OFFICE

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

PETITION FOR A WRIT OF CERTIORARI

EVAN R. CHESLER
KEITH R. HUMMEL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

HENK BRANDS
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

DAVID M. HEILBRON
FRANK M. HINMAN
JASON M. COHEN
MCCUTCHEN, DOYLE, BROWN & ENERSON
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

June 15, 2001

Counsel for Petitioners

(Additional Counsel Listed on Inside Cover)

WALT M. BRITT
CHANDLER & BRITT, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

HAROLD G. CLARKE
NORMAN L. UNDERWOOD
JOHN J. DALTON
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

QUESTIONS PRESENTED

1. Whether, in reviewing a punitive damages award for excessiveness, a state appellate court may disregard the "third guidepost" of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) — which calls for a comparison between the punitive damages awarded and penalties authorized by statute for comparable conduct — where the state legislature has authorized no penalties at all.

2. Whether due process permits punitive damages to be imposed when the illegality of the defendant's conduct was not clearly established at the time it occurred.

3. Whether an appellate court may evaluate a trial court's review of a punitive damages award under a highly deferential "shock the conscience" standard.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc., were defendants and appellants in the proceedings below.

Respondents Six Flags Over Georgia LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee for the Six Flags Claims Trust, were plaintiffs and appellees in the proceedings below.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is directly or indirectly held by AT&T Corp., a publicly held company.

Six Flags Entertainment Corporation is currently known as Six Flags Operations Inc. but for the sake of simplicity will herein be called Six Flags Entertainment Corporation (as it was by the courts below). Six Flags Operations Inc. is wholly owned by Six Flags, Inc. (formerly known as Premier Parks Inc.), a publicly held company. Six Flags, Inc., has no parent company, and no publicly held company owns 10 percent or more of its stock.

Six Flags Theme Parks Inc. is wholly owned by Six Flags Operations Inc.

Six Flags Over Georgia, Inc., is wholly owned by Six Flags, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc. ("petitioners"), respectfully petition for a writ of certiorari to the Georgia Court of Appeals. That court affirmed a trial court decision entering judgment on a jury verdict awarding punitive damages totaling more than *a quarter of a billion dollars*.[1] It did so, however, in violation of petitioners' federal due process rights.

Review in this Court is warranted on three grounds. *First*, the Georgia Court of Appeals violated petitioners' due process

[1] With statutory interest running at 12 percent per annum, the punitive damages award now stands at more than $333 million. That sum does not include the separate award of approximately $200 million in compensatory damages (almost $250 million with interest) that petitioners have already paid.

rights by failing to conduct meaningful review of the punitive damages award. Although this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), required courts to evaluate punitive damages awards for excessiveness by reference to three guideposts, the court below altogether ignored the third guidepost, under which a reviewing court must compare the punitive damages award with "the civil or criminal penalties that could be imposed for comparable misconduct" under applicable state statutes. *Id.* at 583. The Georgia court's failure to make that required comparison is emblematic of a widespread and disturbing trend among state courts, many of which have felt free to ignore the third *BMW* guidepost where the state legislature has authorized no penalties for comparable conduct at all.

Second, the Court should grant certiorari to resolve a conflict of authority concerning the important and recurring question whether punitive damages may be imposed in cases where, at the time of the defendant's conduct, the illegality of that conduct was not clearly established. Constitutional restrictions on punitive damages awards are founded in important part on the Due Process Clause's notice requirement. Thus, imposition of punitive damages is particularly troubling where liability is predicated on conduct condemned on a newly conceived theory of which the defendant had no advance notice. Yet, in conflict with other courts, the Georgia courts permit imposition of punitive damages in just such circumstances.

Finally, the decision below was based on a standard of review that cannot survive this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). The Georgia Court of Appeals, in reviewing the district court's evaluation of the punitive damages award for excessiveness, applied the most deferential standard imaginable: whether the award was "so excessive . . . as to

shock the judicial conscience." Pet. App. 35a. This Court held in *Cooper*, however, that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the [*BMW*] principles." 121 S. Ct. at 1685. Thus, the Court should, at a minimum, vacate the judgment below and remand the case for further consideration in light of *Cooper*.

OPINION BELOW

The opinion of the Georgia Court of Appeals (Pet. App. 1a-35a) is reported at 537 S.E.2d 397.

JURISDICTION

The Georgia Court of Appeals entered its judgment on July 13, 2000, and denied a motion for reconsideration on July 27, 2000 (Pet. App. 39a). The Georgia Supreme Court denied a petition for a writ of certiorari on January 18, 2001 (*id.* at 40a), and denied a motion for reconsideration on February 16, 2001 (*id.* at 41a). On May 7, 2001, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including June 15, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. This case involves a business dispute between partners in a limited partnership. Respondents are the limited partner (itself a partnership of wealthy investors who relied on the arrangement as a tax shelter) and certain related parties. Petitioners are the general partner and the companies that

were its corporate parents at the time of the relevant events.[2] The limited partnership was formed in 1967 to run the Six Flags theme park near Atlanta, Georgia. *See* Pet. App. 3a. In the partnership agreement, the limited partner promised to contribute an initial investment, and the general partner promised to manage and operate the theme park. After fixed distributions of $2.1 million annually to each of the partners and an additional management fee to the general partner, the agreement called for profits to be divided 70/30, with 70 percent going to the general partner and 30 percent to the limited partner. *See id.*

The partnership agreement granted the general partner "exclusive control of the management of the business and affairs of the limited partnership," *id.*, which included responsibility for determining how much of the park's revenue should be re-invested in capital improvements (*e.g.*, new rides and other attractions). The agreement required the general partner to make "minimum Capital Improvements" of $800,000 each year. *See id.*[3] The agreement contained no

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[2] During most of the relevant time period, petitioner Time Warner Entertainment Company, L.P. ("Time Warner"), owned about half the stock in Six Flags Entertainment Corporation, which owned all the stock in Six Flags Theme Parks Inc. (the holding company for all seven Six Flags parks in the United States), which in turn owned all the stock in the general partner in the Georgia park, Six Flags Over Georgia, Inc. *See* Pet. App. 3a-4a. In 1998, all parties sold their interests in the Georgia park to Premier Parks Inc. (currently known as Six Flags, Inc.). *See id.* at 8a.

[3] The relevant clause required the general partner "to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately pr[e]ceding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000." Pet. App. 17a n.5. In each of the years here at issue, the general partner spent vastly more than the required

provision requiring the general partner to invest more than that. Such a duty would have run directly counter to both the $800,000 clause and a clause providing that the general partner was required to keep the park open each season only long enough to earn the limited partner its $2.1 million annual distribution. More generally, such a duty was incompatible with the partnership's purpose as a tax shelter. Increased investment would have risked generating so-called "phantom income": the tax liability of the limited partner's investors might exceed the cash distributions that they actually received.

The partnership agreement was set to expire in 1997. *See id.* In that year, ownership of the entire park would revert to the limited partner, which could then either sell it outright or enter into a new partnership agreement. *See id.* The limited partner chose to do the latter: it invited a number of theme-park-management companies, including the incumbent general partner, to vie for an opportunity to become the new general partner. *See id.* at 6a. Ultimately, the limited partner selected the incumbent. *See id.* at 7a. The parties signed a new 30-year agreement, under which the general partner obligated itself to pay over the life of the contract profit distributions estimated to have a then-present value of approximately $300 million. *See id.* at 7a-8a, 32a.

2. In subsequent litigation in Georgia state court, the limited partner brought various claims regarding the old partnership, alleging that the general partner, aided and abetted by its corporate parents, had for years breached its fiduciary duties. *See id.* at 1a-2a & n.2, 8a. According to respondents, the general partner — to whom they had just voluntarily entrusted management of the park for another 30 years — had purposely sabotaged it between 1992 and 1997.

$800,000. *See id.* at 19a.

Although the park in those years had performed better than ever before,[4] respondents claimed that it could have (and, as a matter of legal duty, should have) done better still. The only reason it had not, respondents alleged, was that petitioners had deliberately starved the park of capital investment — supposedly to reduce its attractiveness in the eyes of other bidders and thereby to allow petitioners to buy the park on the cheap. *See id.* at 8a. In particular, respondents claimed, petitioners had purposely delayed from 1995 to 1997 the installation of a popular roller coaster known as "Batman the Ride." *See id.* at 6a. Respondents claimed that installing this single roller coaster (which cost about $9 million to build) would have boosted profits by $12 million per year, and would thereby immediately have caused a drastic increase in the park's value. *See id.* at 9a.

In addition, respondents claimed that the general partner had engaged in certain financial improprieties. In particular, respondents asserted that Time Warner had received in 1991 a $20 million fee in return for a promise to sell only Coca-Cola beverages at all seven Six Flags parks nationally, but had not given the Georgia partnership its *pro rata* share (about $3 million). *See id.* at 4a, 11a, 33a. Respondents also claimed that petitioners had charged to the partnership about $4 million in corporate expenses that petitioners should have borne alone. *See id.* at 11a, 33a. Finally, respondents claimed that petitioners had sold the partnership a roller coaster known as "Viper" for about $1 million more than it was worth. *See id.* at 7a, 11a, 33a.

Although respondents' share of the claimed injury (even considered in the most favorable light) thus added up to only

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[4] In the years here relevant, the park on average earned profits of more than $15 million per year, whereas it had earned less than $12 million per year previously.

a few million dollars, respondents contended that they had in fact been injured to the tune of hundreds of millions. This was so, they argued, because theme parks are usually bought and sold at about a dozen times the previous year's profits. *See id.* at 8a. Thus, respondents contended, if petitioners had managed the park properly, its 1997 profits would have been more than $12 million higher, so that respondents would have received an additional sum of about $150 million in the 1997 transaction. *See id.* at 11a, 32a-33a. (Respondents did not explain how installing a $9 million ride logically could boost the park's value by $150 million overnight.) In addition, respondents argued that their misappropriation claims had blossomed into as much as $50 million, *see id.* at 31a n.6, 33a — on the theory that petitioners had used some of the supposedly misappropriated funds to finance their investment in the chain of Six Flags parks, and that respondents were therefore entitled to a "constructive trust" on the proceeds of that investment (which had vastly appreciated over the years), *see id.* at 4a, 8a, 33a.

Petitioners, for their part, denied that the general partner had under-invested in the park and demonstrated that it had reasonably decided to postpone installing "Batman the Ride" because it feared (correctly, as it turned out) that the 1996 Olympics would draw crowds away from the park. *See id.* at 6a. Moreover, petitioners argued, respondents' capital-improvements claim was at odds with Georgia law, under which contractual duties take priority over duties that might otherwise be imposed by default principles of fiduciary duty law. In light of the partnership agreement's express language (including the clauses requiring capital investment of only $800,000 annually and authorizing the general partner to close the park for the season after earning $2.1 million) and the contract's underlying purpose to create a tax shelter, petitioners argued, Georgia law did not permit implying a

fiduciary duty to increase the park's profits through maximized capital investment. *See id.* at 16a n.4. As for the other claims, petitioners showed that they had not misappropriated anything belonging to the partnership.

The trial court, however, refused to grant summary judgment or direct a verdict for petitioners. In fact, it declined to construe the contract at all, instead leaving that task to the jury. *See id.* at 15a-16a. Moreover, in a trial riddled with error, the trial court concealed much of the relevant evidence from the jury's view. For example, evidence that the parties' purpose was to create a tax shelter was suppressed on the theory that it might unduly prejudice respondents by drawing the jury's attention to their wealth. *See id.* at 22a. And, to punish petitioners for a supposed discovery violation, the trial court excluded evidence that would have unequivocally shown that the supposedly misappropriated Coca-Cola funds were not in fact used to finance petitioners' investment in the Six Flags parks. *See id.* at 24a-27a.

Thus blind-sided, the jury returned a monstrous verdict. It awarded more than $149 million to the limited partner in connection with the capital-improvements claim and more than $48 million to the partnership in connection with both the capital-improvements claim and the financial-improprieties claims — a total of more than $197 million in compensatory damages. *See id.* at 2a. The jury then added another $257 million in punitive damages, almost all of which was awarded against the general partner's ultimate corporate parent, Time Warner. *See id.* at 2a & n.3. At more than $454 million, the verdict was (and is) by far the largest verdict ever awarded in Georgia.

The trial court nonetheless refused to set aside the verdict. In particular, the trial court rejected petitioners' argument that

the punitive damages award was so excessive as to violate not only state-law limitations but also petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See* Defendants' Memorandum in Support of Amended Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial 76-78 (Ga. Super. Ct. filed Feb. 1, 1999). In its sole comment addressing punitive damages, the trial court stated that "the awards of compensatory and punitive damages, both separately and collectively are not so clearly excessive as to be inconsistent with the preponderance of the evidence." Pet. App. 37a.

3. The Georgia Court of Appeals affirmed in all respects. The Court of Appeals saw no error in the trial court's refusal to construe the contract, for it held that, fortuitously, the jury had construed the contract correctly. *See id.* at 15a-16a. According to the Court of Appeals, the $800,000 clause did not in any way limit the general partner's investment obligation but prescribed only the minimum applicable when fiduciary duties did not require more. *See id.* at 17a. And, the court held that, because Georgia law imposed a fiduciary duty to treat one's partners in the "utmost good faith," *id.* at 12a-13a, 19a, the jury was entitled to determine that the general partner was under "a duty to maximize the performance" of the park by investing more than $800,000 annually, *id.* at 19a — despite the contractual provisions to the contrary. The Court of Appeals also saw no reason to be concerned by the imposition of liability on the general partner's corporate parents. Although the court acknowledged that prior Georgia case law had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty," *id.* at 13a, the court nevertheless held that such a cause of action had been "implicit" in Georgia law, *id.* at 13a-14a.

The Court of Appeals also rejected petitioners' arguments that the punitive damages award was unconstitutionally excessive. *See* Brief of Appellants 59-60 (Ga. Ct. App. filed Sept. 20, 1999); Reply Brief of Appellants 29-30 (Ga. Ct. App. filed Oct. 22, 1999). The sum total of the court's analysis was as follows:

> An award of punitive damages will not be disturbed on appeal unless it is "so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." (Citation and punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga.App. 619, 620, 507 S.E.2d 168 (1998). The $257 million punitive damages award was roughly 1.3 times the $197 million in compensatory damages. Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias. See *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. [161,] 164(1)(e), 473 S.E.2d 256 [(1996)]. Given a 1.3-to-1 ratio, we cannot say that the award was excessive as a matter of law. See *Hosp. Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614(1), 409 S.E.2d 501 (1991) (260-to-1 ratio upheld). We find no error.

Pet. App. 35a.

Petitioners then sought discretionary review in the Georgia Supreme Court, challenging the constitutionality of the punitive damages award. *See* Petition for Writ of Certiorari 21-26 (Ga. filed Aug. 16, 2000); Reply Brief in Support of Petition for Writ of Certiorari 9-11 (Ga. filed Sept. 20, 2000). Despite the importance of the case and the massive amount in controversy, the Georgia Supreme Court denied the

petition, *see* Pet. App. 40a, and later denied reconsideration, *see id.* at 41a.

Petitioners subsequently paid the compensatory award of almost $200 million (nearly $250 million with interest). With respect to the punitive damages award, however, petitioners requested that, pending review in this Court, the Court of Appeals grant a stay. When the Court of Appeals almost immediately denied that request, petitioners sought a stay in this Court, relying on the same three merits questions presented in this Petition. In opposing the application, respondents did not dispute the certworthy nature of the questions presented; to the contrary, respondents conceded that they "*might* merit this Court's review." Response to Application for Stay 1, No. A-725 (filed Feb. 26, 2001). Instead, respondents argued only that the Court of Appeals' decision was correct and that, in any event, petitioners had failed to preserve those questions for review in this Court.[5] Rejecting those objections, Justice Kennedy granted the requested stay. *See* Pet. App. 42a; *see generally* Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* 689-97 (7th ed. 1993) (stay appropriate when there is a "reasonable probability" that certiorari will be granted).

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[5] In particular, respondents argued that, under Georgia procedure, petitioners had forfeited all constitutional arguments by appealing to the Georgia Court of Appeals instead of directly to the Georgia Supreme Court (even though settled Georgia case law was to the contrary), and that petitioners had failed to preserve their arguments in the Georgia Court of Appeals (even though petitioners' briefs filed in that court clearly argued that the punitive damages award violated the due process principles recognized in *BMW*).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS REQUIRED TO HALT A TREND IN STATE APPELLATE COURTS TO DISREGARD *BMW*'S THIRD GUIDEPOST.

In a series of decisions issued over the past decade, this Court has held that due process places important limitations on punitive damages awards. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Due process dictates fundamental procedural protections: the jury's discretion must be harnessed and its exercise must be carefully reviewed by trial and appellate courts. *See, e.g.*, *Honda*, 512 U.S. at 420-21; *Haslip*, 499 U.S. at 18-22. Due process also imposes substantive limitations: an award is altogether impermissible if it is "grossly excessive." *Cooper*, 121 S. Ct. at 1684; *BMW*, 517 U.S. at 574-75. Whether an award is "grossly excessive" is gauged by three guideposts: (a) "the degree of reprehensibility" of the defendant's conduct, (b) "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award," and (c) the difference between the punitive damages award and "the statutory fines available . . . for similar malfeasance." *BMW*, 517 U.S. at 575, 584; *see Cooper*, 121 S. Ct. at 1687.

Prior to *BMW*, this Court stated in *Honda* that, although due process requires state courts to exercise at least some measure of excessiveness review, the case before it did not require the Court to answer "the more difficult question of what standard of review is constitutionally required." 512 U.S. at 432 n.10. *BMW* answered that question. Because the constitutional norms from which this Court derived its three-

guidepost standard apply equally to state courts, state courts must apply that standard or one that is even more stringent. Thus, a due process violation occurs when a punitive damages award does not receive judicial review under a standard at least as stringent as the standard that this Court applied in *BMW*.

Such a violation occurred in this case. After the trial court failed to conduct any appreciable scrutiny at all, *see supra*, pp. 8-9, the Georgia Court of Appeals conducted a review falling well short of the federally required minimum. Although the court did not profess itself altogether powerless to review the jury's award (as had the Oregon courts in *Honda*), it restricted its substantive review to a single factor: the ratio of punitive to compensatory damages. Thus, the Court of Appeals' analysis consisted of nothing more than the statement that, "[g]iven a 1.3-to-1 ratio, we cannot say that the award was excessive as a matter of law." Pet. App. 35a. Simply put, the Court of Appeals reviewed the award exclusively under *BMW*'s second guidepost.[6]

The Court of Appeals' failure to take account of *BMW*'s other guideposts — particularly *BMW*'s third guidepost, which requires a punitive damages award to be compared to "the civil or criminal penalties that could be imposed for comparable misconduct," 517 U.S. at 583 — is representative of a disquieting trend among state appellate courts. Where state statutory law assigned no fines or penalties for comparable conduct at all, numerous state courts have simply

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[6] This was consistent with prior precedent committing the same error. *See Bibb Distrib. Co. v. Stewart*, 519 S.E.2d 455, 459 (Ga. Ct. App. 1999), *cert. denied*, No. S99C1524, 1999 Ga. LEXIS 863 (Ga. Oct. 22, 1999).

disregarded *BMW*'s third guidepost as "inapplicable" or "not relevant."[7]

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[7] *See, e.g., AutoZone, Inc. v. Leonard*, Nos. 1991293 & 1991301, 2001 WL 429359, at *8 (Ala. Apr. 27, 2001) ("[w]e cannot consider this guidepost, because Alabama law provides no sanctions, either civil or criminal, for a retaliatory discharge"); *Wal-Mart Stores, Inc. v. Goodman*, No. 1981683, 2000 WL 1868437, at *12 (Ala. Dec. 22, 2000) ("We have no basis for considering [*BMW*'s third guidepost] relevant."); *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 445 (Miss. 1999) (disregarding third guidepost because "there are no other sanctions which would be imposed under the facts of this case"), *cert. denied*, 120 S. Ct. 2219 (2000); *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d 1, 19 (N.M. 1998) (disregarding third guidepost because "there is no statutory fine for this or similar misconduct"); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997) ("We consider this factor largely irrelevant in the present case because the 'conduct at issue' here was scarcely that contemplated by the legislative action."); *Ford Motor Co. v. Sperau*, 708 So.2d 111, 122 (Ala. 1997) ("a $2,000 statutory penalty for deceitful conduct is so meager that there is little basis for comparing it with any meaningful punitive damages award"), *cert. denied*, 523 U.S. 1075 (1998); *BMW of N. Am., Inc. v. Gore*, 701 So.2d 507, 514 (Ala. 1997) ("[b]ecause the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award"); *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 692 (W. Va. 1997) (disregarding third guidepost where state law provided only a "cause of action" without establishing a "penalty limit that could be referred to for comparison purposes"), *cert. denied*, 522 U.S. 1091 (1998); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562-63 (Ind. Ct. App. 1999) ("In this case . . . there is no comparable civil statutory penalty for the manufacture and sale of a defective product. The same is true for criminal penalties. Thus this portion of the [*BMW*] indicia of excessiveness is not applicable."), *cert. denied*, 120 S. Ct. 1424 (2000); *Blume v. Fred Meyer, Inc.*, 963 P.2d 700, 709 (Or. Ct. App. 1998) ("[*BMW*'s third] guidepost is of limited assistance here where, unlike in *BMW*, there are no legislatively enacted civil sanctions against which to measure the prohibited conduct and criminal offenses have only limited similarity to defendant's conduct.").

That conclusion is simply wrong. If a state imposes no statutory penalties for comparable conduct, that is all the more reason to hold that no punitive damages award (or at least a substantially reduced award) is appropriate. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (absence of statutory penalties "suggests that [the defendant] was not on notice that its conduct could give rise to substantial non-compensatory liability"). Thus, this troubling pattern of state-court decisionmaking effectively destroys a key component of *BMW*'s analytical framework.

This case graphically illustrates just why ignoring *BMW*'s third guidepost is as harmful as it is wrong. Petitioners were subjected to a fine of more than a quarter of a billion dollars — more, for example, than all federal antitrust fines in 1997 combined. *See* U.S. Dep't of Justice, *Fiscal Year 1998 Annual Accountability Report* III-8 (1999) (Antitrust Division obtained record $205 million in fines). The Court of Appeals allowed this extraordinary result even though, had it compared the jury's award to statutory fines and penalties for conduct comparable to that of petitioners (a supposed breach of a fiduciary duty to maximize the profits of a common business venture), it would have found that Georgia law provides for *none*.

Accordingly, this case presents an appropriate vehicle for this Court to address state courts' misapprehension and increasing disregard — indeed, defiance — of *BMW*'s third guidepost.

II. REVIEW IS REQUIRED TO CLARIFY THAT PUNITIVE DAMAGES MAY NOT BE AWARDED WHEN, AT THE TIME OF THE DEFENDANT'S CONDUCT, ITS ILLEGALITY WAS NOT APPARENT.

Certiorari is further warranted because the punitive damages award in this case simply cannot be reconciled with the substantive limits recognized in *BMW*. This case involves non-violent conduct,[8] purely economic harm,[9] a cause of action more contractual than tortious in nature,[10] mostly vicarious liability,[11] and supposed victims who were wealthy and sophisticated investors, expertly advised by the Goldman

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[8] *See, e.g., BMW*, 517 U.S. at 576 ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence") (internal quotation marks omitted); *Hamilton*, 122 F.3d at 862 ("the fact that [the defendant's] conduct here was non-violent makes it less reprehensible").

[9] *See, e.g., BMW*, 517 U.S. at 576 ("The harm BMW inflicted on Dr. Gore was purely economic in nature."); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 638 (10th Cir. 1996) ("torts causing only economic injury [are] less worthy of large punitive damages awards than torts inflicting injuries to health or safety"), *cert. denied*, 520 U.S. 1241 (1997).

[10] *See, e.g., Hamilton*, 122 F.3d at 862 (punitive damages are particularly inappropriate "when [the injury] arises out of a contractual relationship where the parties can and should contractually protect themselves by providing for explicit remedies in the event of breach"); *Inter Medical Supplies, Ltd. v. EBI Medical Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999) (same), *cert. denied*, 120 S. Ct. 791 (2000). Indeed, although the complaint in this case included claims for fraud and conversion, respondents voluntarily withdrew the former, and the jury found for petitioners on the latter. *See* Pet. App. 2a n.2.

[11] *See, e.g., TXO*, 509 U.S. at 469 (Kennedy, J., concurring in part and concurring in the judgment) ("A case involving vicarious liability . . . might present different issues.").

Sachs investment bank and the Gibson Dunn law firm.[12] Thus, one might expect that this case — with its $257 million punitive damages award — involved at least intentional violations of well-recognized legal prohibitions.

But that expectation would be unfounded. The Georgia courts allowed punitive damages to be imposed in connection with conduct that petitioners could not previously have known to be even actionable. For one thing, petitioners in this case had no reasonable cause to believe that a court might one day abdicate its duty to construe the contract and permit a jury to impose liability for a failure to make capital expenditures that petitioners believed imprudent. In light of the partnership agreement (including the $800,000 clause, the shut-down clause, and its purpose as a tax shelter), petitioners had every reason to believe that their conduct was entirely lawful. *See supra*, pp. 4-5, 7-8. Even assuming that petitioners were mistaken in interpreting the partnership agreement, their reading was plainly reasonable. *Cf. BMW*, 517 U.S. at 578 ("a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors").

For another thing, almost the entirety of the punitive damages award in this case was imposed not on the general partner that supposedly mistreated respondents, but on the general partner's ultimate corporate parent that supposedly "aided and abetted" the general partner. *See* Pet. App. 2a n.3 (of $257 million in punitive damages, $245 million was awarded against Time Warner alone). This was allowed even though, prior to this case, Georgia courts had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty." *Id.* at 13a-14a. Accordingly,

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[12] *See, e.g., BMW*, 517 U.S. at 576 (economic harm may justify punitive damages "when the target is financially vulnerable"); *OXY*, 101 F.3d at 638 (same).

the general partner's corporate parents simply had no reason to suspect that their conduct (even if viewed in the least charitable light) might result in liability for them — let alone a monstrous, quarter-billion-dollar, punitive damages award.

The award in this case therefore cannot be squared with the Due Process Clause's notice requirement, a central source of the excessiveness limitation recognized in *BMW*. As this Court noted in *BMW*: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." 517 U.S. at 574. Accordingly, the Court has cautioned that a punitive damages award is impermissible unless "prior law fairly indicated that a punitive damages award might be imposed." *TXO*, 509 U.S. at 465-66 (plurality).[13] Lower federal courts have likewise recognized that punitive damages may not be

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[13] *See also BMW*, 517 U.S. at 584 ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation — or, indeed the first 14 violations — of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment."); *id.* at 585 (defendant had "entitlement to fair notice of the demands that the several States impose on the conduct of its business"); *id.* at 587 (Breyer, J., concurring) (a State must "provide citizens notice of what actions may subject them to punishment"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) ("Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damages award."); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) (punitive damages were not permitted where "[t]here was . . . no departure from any prescribed or known standard of action").

imposed unless the illegality of the defendant's conduct was apparent at the time it occurred.[14]

On that principle, numerous state courts have refused to permit the imposition of punitive damages in connection with newly conceived torts. Thus, in *Nees v. Hocks*, 536 P.2d 512 (Or. 1975), the Oregon Supreme Court created a new tort (for retaliatory discharge of an employee who, in the view of the employer, had not tried hard enough to be excused from jury duty) but refused to permit any punitive damages award. The court noted: "If we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Id.* at 517. Punitive damages were therefore impermissible, the court reasoned, just as "[t]he sanctions of the criminal law cannot constitutionally be imposed when the criminality of the conduct is not capable of being known beforehand." *Id.* Numerous other States have followed *Nees*.[15]

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[14] *See Patton v. TIC United Corp.*, 77 F.3d 1235, 1244 (10th Cir.) (punitive damages may be imposed only "if a party has fair notice that its acts were tortious, and if prior law indicates that the defendant's tortious conduct was sufficiently 'egregious' to support an award of punitive damages"), *cert. denied*, 518 U.S. 1005 (1996); *see also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir.) ("[C]onstitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether this defendant had reason to believe that his *specific conduct* could result in a particular damage award.") (emphasis added), *cert. denied*, 528 U.S. 931 (1999); *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1365-66 (5th Cir. 1989) ("[P]unitive damages law . . . [must provide defendant] with adequate notice of the *type of conduct* which would subject it to a significant punitive damage award.") (emphasis added), *vacated on other grounds*, 499 U.S. 914 (1991).

[15] *See, e.g., Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 687 (Iowa 1990) ("punitive damages should not be awarded in the case

By contrast, Georgia allows punitive damages to be imposed even in connection with entirely novel torts. For example, in *Banks v. ICI Americas, Inc.*, 469 S.E.2d 171 (Ga. 1996), the defendant argued that, because it had been held liable under a product-liability rule that the Georgia Supreme Court had announced for the first time after the defendant had engaged in the challenged conduct, punitive damages should not be available. Reversing a Georgia Court of Appeals decision agreeing with the defendant (*see ICI Americas, Inc. v. Banks*, 460 S.E.2d 797 (Ga. Ct. App. 1995)), the Georgia Supreme Court rejected that contention. The Georgia Supreme Court assumed for purposes of its decision that the product-liability rule was "new," *see* 469 S.E.2d at 174, but held that, so long as the statutory standard for the availability of punitive damages (calling for "willful misconduct") was met, there was no constitutional

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that first recognizes the tort"); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984) ("It would be unfair to punish employers for conduct which they could not have known beforehand was actionable in this jurisdiction."); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984) ("[S]ince this is a case of first impression in this jurisdiction, we conclude that punitive damages should not be recoverable in the instant case."); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 358 (Ind. 1982) (award of punitive damages not permissible where "the law was unsettled in this state"); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978) ("punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one"); *Murphy v. City of Topeka*, 630 P.2d 186, 193 (Kan. Ct. App. 1981) ("[I]nasmuch as this is the first recognition of such a cause [of action] by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust."); *Vigil v. Arzola*, 699 P.2d 613, 621 (N.M. Ct. App. 1983) ("[T]here is no persuasive reason to allow punitive damages in this case where the employer here could not have anticipated beforehand that the claim would even be actionable."), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984).

impediment, *see id.* at 175. The court so held over a dissent forcefully reminding the majority that "[r]etroactive imposition of punitive damages under these circumstances fails to satisfy basic notions of equity and fairness." *Id.* at 176.

Regrettably, Georgia is not alone in permitting imposition of punitive damages under such circumstances. For example, in *Parnar v. Americana Hotels, Inc.*, 1989-1 Trade Cas. (CCH) ¶ 68459 (Haw. 1988), *cert. denied*, 492 U.S. 918 (1989), the Supreme Court of Hawaii permitted the imposition of punitive damages in connection with a cause of action for retaliatory discharge of an employee for testifying against the employer — a tort that had not yet been recognized at the time of the defendants' conduct. *See id.* at 60507. It did so over a dissent firmly rejecting this result as violative of due process. As the dissent put it: "[T]he court is allowing the defendants to be punished for an act which was countenanced by the law when committed. The notion that defendants can be punished for conduct they could not have known beforehand was even actionable frightens me." *Id.* at 60511 (Nakamura, J., dissenting); *see also Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 795 (N.D. 1987) (permitting imposition of punitive damages in connection with a cause of action recognized for the first time in that case).

This Court should now grant this petition to resolve the conflict. It should then hold that due process does not allow the imposition of punitive damages unless the illegality of the defendant's conduct was sufficiently clear at the time the conduct took place. Although this Court has been understandably reluctant to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *Haslip*, 499 U.S. at 19, the proposed approach would, in a discrete set of cases, provide meaningful guidance that follows

naturally from this Court's precedent. Moreover, the proposed limitation is easily applied, as lower courts can readily build on analogous case law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (public officials immune if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("in the light of pre-existing law the unlawfulness must be apparent").[16]

III. AT A MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *COOPER v. LEATHERMAN*.

In affirming the enormous punitive damages award in this case, the Georgia Court of Appeals applied an exceedingly deferential standard of review. Citing prior Court of Appeals precedent, the court held that "[a]n award of punitive damages will not be disturbed on appeal unless it is so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." Pet. App. 35a (internal quotation marks omitted).[17]

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[16] *See also Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality) ("new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"); *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (decision announces new rule when "outcome" was "susceptible to debate among reasonable minds").

[17] *See also E-Z Serve Convenience Stores, Inc. v. Crowell*, 535 S.E.2d 16, 20 (Ga. Ct. App. 2000) ("Even though the evidence is such as to authorize a greater or lesser award than that actually made, the appellate court will not disturb it unless it is so flagrant as to shock the conscience."); *Wilson Welding Serv. v. Partee*, 507 S.E.2d 168, 170 (Ga. Ct. App. 1998) ("An award of punitive damages will not be disturbed on appeal unless it is so excessive or inadequate as to shock the judicial

Georgia precedent indicates that this standard calls for scrutiny at least as deferential as abuse-of-discretion review.[18]

Georgia's deferential review is incompatible with this Court's recent decision in *Cooper*, which issued subsequent to the decision below. The petitioner in *Cooper* had challenged as unconstitutionally excessive a $4.5 million punitive damages award based on claims that the petitioner had engaged in unfair competition. The Ninth Circuit affirmed the award on the ground that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." 121 S. Ct. at 1682 (internal quotation marks omitted). In this Court, the petitioner successfully argued that the Ninth Circuit had applied an incorrect standard of review. This Court held that appellate courts "should apply a *de novo* standard of review" in evaluating a trial court's scrutiny of a punitive damages award pursuant to *BMW*. *Id.* at 1685-86. Because the court of appeals had applied "a less demanding standard," this Court vacated the judgment and remanded for further review under the proper *de novo* standard. *Id.* at 1689.

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conscience to the degree that a judgment entered thereon constitutes an error of law.") (internal quotation marks omitted), *cert. denied* (Ga. Feb. 5, 1999); *Roberts v. Chapman*, 492 S.E.2d 244, 246 (Ga. Ct. App. 1997) ("[t]he award, having been subsequently approved by the trial court will not be disturbed on appeal unless it is so excessive or inadequate as to shock the judicial conscience") (internal quotation marks omitted), *cert. denied* (Ga. Jan. 5, 1998); *Clarke v. Cotton*, 429 S.E.2d 291, 293 (Ga. Ct. App. 1993) ("The appellate court will not disturb the award absent an award so excessive or inadequate as to shock the judicial conscience.") (internal quotation marks omitted), *aff'd*, 440 S.E.2d 165 (Ga. 1994).

[18] *See, e.g.*, *Southeastern Security Ins. Co. v. Hotle*, 473 S.E.2d 256, 261 (Ga. Ct. App. 1996) ("The trial court did not abuse its discretion in refusing to grant Southeastern's [*BMW*-based] motion for j.n.o.v."); *Clarke*, 429 S.E.2d at 293 ("the trial court did not abuse its discretion in refusing to overrule the jury's punitive damage award").

The holding in *Cooper*, which rests on considerations that apply equally to state courts, makes perfectly clear that the standard of review applied by the Georgia Court of Appeals is inadequate. This Court should therefore vacate the judgment below and remand for further consideration in light of the decision in *Cooper*. *See generally* Stern & Gressman, *Supreme Court Practice* 192-93, 243-44. Indeed, this Court recently did just that where an intermediate state appellate court in California had applied a standard similarly falling short of *de novo* review. *See San Paolo U.S. Holding Co. v. Simon*, 69 U.S.L.W. 3748 (May 29, 2001) (No. 00-1457) (remanding "for further consideration in light of *Cooper*").[19]

The conclusion that a "GVR" is in order is fortified here because, as in *Cooper*, it is likely that "a thorough, independent review of the [trial court's] rejection of petitioner's due process objections to the punitive damages award might well have led the Court of Appeals to reach a different result." 121 S. Ct. at 1688. Freed of the perceived constraints of deferential review, the Georgia Court of Appeals should conclude that petitioners' conduct simply was not such as to permit the imposition of a $250 million punitive damages award — particularly where the illegality of petitioners' conduct was not apparent at the time it transpired, the ratio of punitive damages to real injury (uninflated by respondents' illogical "multiplier" theories), if any, was high, and there was a complete absence of statutory fines for similar conduct.

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[19] Indeed, the standard that the California court applied in *San Paolo* was less deferential than the standard that the Georgia Court of Appeals applied here. *See* Petition for a Writ of Certiorari at 8, 18-19, *San Paolo U.S. Holding Co. v. Simon*, No. 00-1457 (filed Mar. 12, 2001) (explaining that California court had inquired whether there was "substantial evidence . . . which will support the conclusion reached by the jury") (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EVAN R. CHESLER
KEITH R. HUMMEL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

DAVID M. HEILBRON
FRANK M. HINMAN
JASON M. COHEN
MCCUTCHEN, DOYLE, BROWN & ENERSON
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

WALT M. BRITT
CHANDLER & BRITT, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

HENK BRANDS
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

HAROLD G. CLARKE
NORMAN L. UNDERWOOD
JOHN J. DALTON
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Petitioners

June 15, 2001

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA
THIRD DIVISION

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C. ET AL.

[Decided July 13, 2000]

Before: ANDREWS, P.J., RUFFIN, and ELLINGTON, JJ.

ELLINGTON, Judge.

This appeal is from a jury verdict in favor of a limited partnership and its sole limited partner against the general partner which from 1991 through 1998 operated the partnership's business investment, the Six Flags Over Georgia theme park. Appellee Six Flags Over Georgia, L.L.C. ("Flags") is the limited partnership which owns the park. Appellee Six Flags Fund, Ltd., L.P. ("Fund") is the partnership's sole limited partner and is comprised of individual investors.[1] Although appellant Six Flags Over Georgia, Inc. ("SFOG") was the named general partner corporate entity responsible for operating the park, appellees alleged that Time Warner Entertainment Company, L.P. ("TWE"), acting through and in concert

[1] Appellee Six Flags Claims Trust is not a limited partner and was awarded no damages. It was created solely to fund the litigation and handle any proceeds of the litigation.

with its subsidiaries SFOG, Six Flags Entertainment Corporation ("SFEC"), and Six Flags Theme Parks, Inc. ("SFTP"), assumed the role of general partner and directed the activities of the partnership. The complaint[2] alleged, in essence, that the general partner damaged the appellees by preferring its own financial interest over that of the partnership and of the limited partner. The jury returned a verdict in favor of the appellees, awarding a total of $197,296,000 in compensatory damages and $257,000,000 in punitive damages.[3] Appellants contend they are entitled to a new trial because (1) the trial court should have directed a verdict in favor of certain "non-partner defendants"; (2) the court should have directed a verdict in appellants' favor on appellees' "capital improvements" claim; (3) the evidence of breach of fiduciary duty was insufficient to support the jury's verdict; (4) the court erred in admitting or excluding certain evidence; (5) the court impermissibly impugned defense witnesses in the jury's presence; (6) the court erred in giving certain jury charges; (7) compensatory damages were either speculative or excessive; and, (8) punitive damages were either unwarranted or excessive. Finding no reversible error, we affirm.

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[2] The complaint set forth counts for breach of fiduciary duty, conversion, fraud, breach of contract, conspiracy to breach contractual obligations, and for an accounting. Of the claims actually submitted to it (breach of fiduciary duty, conversion, and breach of contract), the jury found in favor of appellees on the breach of fiduciary duty claim only.

[3] The jury found that each of the appellants breached the fiduciary duty owed Fund and awarded it $149,175,000 in compensatory damages. The jury also found that each of the appellants breached the fiduciary duty owed Flags and awarded it $48,121,000 in compensatory damages. The jury, finding that each of the appellants acted with a specific intent to harm, awarded punitive damages as follows: from TWE, $183,750,000 to Fund and $61,250,000 to Flags; from SFEC, $6,000,000 to Fund and $2,000,000 to Flags; from SFTP, $2,250,000 to Fund and $750,000 to Flags; from SFOG, $750,000 to Fund and $250,000 to Flags.

Viewed in the light most favorable to support the jury's verdict, the record reveals the following relevant facts: Flags, the partnership which owns the Six Flags Over Georgia theme park, has existed since 1967. The park, much like its sister park in Texas, was developed as a limited partnership comprised of a limited partner investor and a general partner park operator. The rights and responsibilities of the partners were set out in a written agreement which was amended in 1973. The agreement provided that the general partner had "exclusive control of the management of the business and affairs of the limited partnership" and would receive, among other compensation, 70 percent of the park's net cash flow. The partnership agreement also required the general partner to make certain "minimum" capital improvements each year. The 30-year partnership agreement expired on December 31, 1997. When the agreement ended, ownership of the park reverted wholly to the limited partner, Fund, which could then elect to sell the park or to entertain bids from prospective general partners who wished to enter a new partnership agreement. Appellees' principal witness, Avram Salkin, a Fund investor and signatory on the partnership agreement, has acted as Fund's representative for the last 30 years.

In 1990, TWE executives investigated acquiring all seven of the Six Flags theme parks and marketing them as "a national brand." In 1990, TWE bought nineteen percent, with an option to buy an additional thirty percent, of the stock of Six Flags Corporation (SFTP's predecessor), the company which owned five of the Six Flags theme parks and controlled the Georgia and Texas parks' general partner corporations. TWE executive Bob Pittman, the "architect" of the Six Flags deal, pitched the idea of acquiring Six Flags Corporation to the Time Warner, Inc., Board of Directors in July 1991. On December 26, 1991, TWE exercised its option and bought a controlling interest in SFTP, which owned SFOG, the named

general partner of the Georgia park. Pittman, who was president of Time Warner Enterprises, a division of TWE, then became chairman of the board and CEO of SFEC, the TWE subsidiary which owned SFTP. He held those positions until 1995 when he left TWE for America Online. Pittman admitted that "as president of Time Warner Enterprises or Six Flags Entertainment, we were making decisions about the Georgia Park."

As early as February 19, 1991, months before TWE acquired controlling interest in the parks, Pittman began negotiating with the Coca-Cola Company to sell it the exclusive right to market Coca-Cola products at all seven Six Flags theme parks. A confidential agreement dated November 27, 1991, made the Coca-Cola deal contingent upon TWE acquiring a controlling interest in SFTP. The agreement was signed by Pittman as CEO of Time Warner Enterprises and by a Coca-Cola executive. In exchange for the promised sale of these rights, TWE received a one-time $20 million "sponsorship fee" or "marketing advance." On December 26, 1991, TWE used these funds and funds from other sources to exercise its option and buy the additional 30 percent of SFTP stock and controlling interest of the company. On that same date, Coca-Cola and SFEC executed a final marketing agreement. Salkin was not informed that this Flags asset had been sold until 1995, and when he asked to see the Coca-Cola agreement, he was told it was confidential. Flags never received its $2.8 million share of the $20 million fee.

In April 1992, Salkin was invited to meet with Pittman and other TWE and SFEC executives. Pittman immediately wanted to discuss buying out the Georgia theme park. Of course, Salkin could not simply negotiate a sale; he was required by his agreement with Fund investors to "shop" the park to the highest bidder when the partnership agreement expired. When TWE, Flags, and Fund representatives met again in

October 1992, Pittman presented a 150 million-dollar plan for the Georgia park which included building a hotel and an island. According to Salkin, however, Pittman conditioned the plan upon "some type of a deal," and hinted that if Fund and Flags did not cooperate, TWE would build a competing park and would not make capital investments in new thrill rides for the Georgia park. Salkin said Pittman told him that TWE was "not interested in being in the business of managing assets for others."

A year after this meeting, Time Warner, Inc. executives contacted a real estate broker with Cushman & Wakefield's Atlanta office to discuss acquiring land in Georgia. Although the broker met with a Time Warner, Inc. executive, he was retained by SFTP to purchase land as a nominee and to keep the name of the actual buyer confidential. The broker's commissions were paid by SFTP. He was not authorized to discuss any of the land transactions with Salkin or representatives of Fund or Flags.

The broker acquired 13.7 acres of land immediately adjacent to the Georgia park for $1.8 million. On behalf of Time Warner, Inc., the closing papers were signed by Senior Vice President Paul McNicol. The purchase of this property effectively bounded the Six Flags theme park between the Time Warner, Inc. parcels, the Chattahoochee River, and Interstate 20, thus limiting the park's expansion opportunities. The broker was also later told to find a 600-700 acre tract of land 40-60 miles from Atlanta and to refer to the project as the "Pennants Theme Park." On June 30, 1994, the broker went on a helicopter ride with Pittman and SFTP and SFOG executives to view land meeting the project criteria. The helicopter ride was paid for by Time Warner, Inc. and categorized as an expense for "development of [a] new park." Time Warner, Inc. authorized the broker to make offers on the land, which he did. Almost a year later, after negotiating

potential sales and faxing counter-offers to Time Warner Inc.'s lawyers, the broker was told to cease his efforts.

During this time, TWE also studied the feasibility of developing a competing park. Stephen Ross, Bob Daly, and Terry Semel—executives with TWE's Warner Brothers division, who in April 1995 succeeded Bob Pittman as the primary decision makers for the general partner—hired Harrison Price Company to evaluate building a theme park within 100 miles of Atlanta. The evaluation was done using confidential business information from the Six Flags Over Georgia park. Although no competing theme park was ever built, TWE executives did draft a plan dated October 2, 1996, which outlined spending 12 million dollars on capital improvements for the proposed park every third year and five million dollars for each of the two years in between. From 1991 through 1996, TWE never caused during any one year $5 million to be spent on capital improvements at the Georgia Park, even though all capital expenditures would come from the park's surplus operating cash.

In late 1995 and early 1996, Salkin began the task of shopping the park by visiting competitors' theme parks to evaluate them as prospective bidders for general partner. According to Salkin, he learned that major capital investments, particularly in new thrill rides, was the key factor that drove attendance and profits at the parks. When Salkin toured the Georgia park in May 1996, he discovered that the park's operators had been asking the general partner to install an inverted roller coaster, "Batman the Ride," since 1992. Salkin, however, had been told by TWE executive Ross that the Georgia park would not get the coaster in 1996 because park management had agreed that the Olympics would adversely impact park attendance that year. The park operators told Salkin that, although they were concerned about the impact of the Olympics, this did not change their desire to

add the Batman coaster to the park, and stated that they were trying on their own to find a way to market the park during the Olympics. Salkin also testified that Flags had been overcharged for the old but refurbished Viper roller coaster ride which had been installed in 1992. Further, there was evidence that the Georgia park had substantial "deferred maintenance" and needed between $7 and $10 million in basic repair. Salkin also discovered that TWE had been signing key park executives, including SFOG President John Bemet, to employment contracts with TWE that became effective when the partnership ended. Salkin testified that the contracts provided that the employee would not compete against TWE, would not disclose business information to anyone, including Fund and Flags representatives, and would not assist anyone in litigation against TWE.

On June 7, 1996, Salkin and his attorney wrote TWE and SFTP executives and informed them that, if they could not reach an agreement to install Batman the Ride in the Georgia park before the opening of the 1997 season, negotiations with TWE for the general partnership would be deferred. Ten days later, Salkin met with TWE executives Ross and Daly and discussed his grievances. On August 1, 1996, TWE agreed to install Batman the Ride, to transfer land adjacent to the park to Flags, to stop signing park employees to TWE contracts, and to reserve to Fund and Flags any claims each might bring against TWE in future litigation. Consequently, later that month, TWE's Warner Brothers division was allowed to bid for the general partnership. According to Salkin, TWE pledged to build "rides, rides, rides," investing significant amounts in capital improvements, and promised that it was in the amusement park business "to stay." Because TWE made the best offer for the park, Fund selected it to continue as general partner. The parties estimate the present value of the new 30-year partnership agreement at

between $286 million and $300 million. On March 19, 1997, the day after the new partnership agreement was executed, SFOG and SFTP sued Salkin and Fund, seeking to resolve those claims which Fund and Flags had previously reserved. The trial court, by consent order, realigned and added parties and this litigation ensued. Less than a year later, TWE sold all seven of the Six Flags theme parks to Premier Parks, Inc. as a "package deal" for $1.9 billion, resulting in earnings to TWE of approximately $453 million.

Appellees' contention was that TWE intended to buy the Georgia park outright and, if it could not, it planned to use its position as general partner to deliberately under-invest in the park to depress its value. According to appellees, TWE's plan was to deter prospective competing bidders and allow TWE to purchase the park or secure the general partnership at reduced cost at the end of 1997. And, because it was in TWE's financial interest to sell all seven of the Six Flags parks as a package, appellees contended TWE intended to get long-term control of both partnership parks.

To establish these claims, Fund and Flags adduced evidence explaining how amusement parks are typically invested in, valued, and sold. The evidence showed that amusement parks are sold (or management contracts are based) on a multiple of park earnings before interest, taxes, depreciation, and amortization ("EBITDA"). Capital investment in an amusement park, especially in major thrill rides, fuels EBITDA growth, which in turn increases the value of the park. Conversely, low or modest capital investment keeps amusement park earnings and growth flat and the park's value depressed.

Other evidence from TWE's own internal documents showed that once it got control of the Six Flags theme parks, it planned to spend considerably less on the Georgia park than on any of its wholly owned parks. For example, a September

1991 confidential memorandum revealed a plan to make "10 percent annual increases in spending at each of the owned parks and a consistent decline in spending at the partnership parks as their agreements with the company approach their expiration date." As TWE later demonstrated in a slide show presentation to its executives entitled "Six Flags Strategic Choices," the plan to lower capital expenditures was a choice, using their own word, to "milk" the park as part of an overall strategy to "eventually sell pieces or [the] whole business."

TWE documents also revealed that TWE did, in fact, invest considerably less in the Georgia Park as compared to the wholly owned parks. Evidence was produced that TWE consistently installed new thrill rides in its wholly owned parks, following a "major/minor plan" to make large capital investments in a major attraction every second or third year followed by a minor new attraction in the year or years in between. During TWE's 7-year tenure as general partner of the Georgia park, however, the only thrill ride it voluntarily installed was 1992's Viper roller coaster, a 20-year-old traditional coaster which had been removed from the Chicago park to make room there for Batman the Ride. The Viper was considered a minor capital expenditure and a minor new attraction. Each of the owned parks, however, received major new rides every second or third year. And, by 1995, four out of the five wholly owned parks had received Batman the Ride, an inverted coaster, which significantly increased EBITDA at each of those parks. Salkin testified that, after Batman the Ride was installed in Georgia, the park's value increased by 40 percent and pushed its EBITDA to $28 million. Salkin further testified that if the Georgia park had gotten Batman the ride in 1995 and another major attraction in 1997, the park's EBITDA would have risen to approximately $40.7 million, giving it an estimated value in the $500 to $600 million dollar range.

In fact, there was evidence that Batman the Ride had been purchased specifically for the Georgia park's 1995 season, but it was diverted to TWE's wholly-owned St. Louis park because, according to notes from a July 12, 1995 meeting at Warner Brothers Studios between TWE and its business partners, "despite the quick return [on investment], putting an inverted coaster into the [Georgia] Park could increase the limited partner's leverage in negotiating with other potential strategic partners in 1998 and beyond." Consequently, TWE's installation of the coaster would be "subject to a deal with the limited partners." There was evidence that the Olympics were never a factor in TWE's decision to delay installation of the ride, and that installation of a major ride in the Texas partnership park was also delayed until a deal with TWE was reached.

In addition to evidence that TWE withheld capital expenditures on major attractions in the Georgia Park, evidence was also produced that it withheld or distorted requested financial information necessary for Flags and Fund to adequately assess the park's performance and value. In fact, Salkin testified that he stopped receiving detailed monthly financial reports when he started to shop the park in 1995. Salkin said he repeatedly requested data on the park's value and performance, the effect of coasters on EBITDA, the level of capital expenditures, and the park's projected future value and performance, but that he received only scant and incomplete information. Fund did not receive a 30-year projection showing, by TWE's own estimation, that the present value of the Georgia park was close to $600 million. There was evidence that TWE did not divulge this information because it wanted to induce Fund to choose from TWE's bid proposals an arrangement with a higher annual payment and a smaller percentage of profits. Without the information he requested, Salkin testified he could not adequately evaluate the proposals

received from other bidders or from TWE. Moreover, there was evidence that the competing bidders, having only the information Salkin had, were induced to make conservative, and consequently losing, bids for the general partnership.

Appellees' expert, a management consultant in the theme park industry, testified about what a prospective bidder was warranted in investing in the Six Flags Over Georgia theme park. He opined that the park was "under-invested," "not keeping pace," and "suffering" compared to comparable parks. Further, in a time when Atlanta's population and economy were growing much faster than that of the other Six Flags cities, the Georgia Park should have been able to capture the market in 1997 and generate $100 million instead of the $87.8 million it brought in. Using a conservative 10.7 multiple of EBITDA, the expert opined that the Georgia park, had it been properly managed and invested, would warrant an investment of about $442 million in 1998. Using the higher 13.6 multiple of EBITDA that TWE actually used in its sale of all seven Six Flags theme parks to Premier Parks in 1998, the warranted investment could have been as high as $560 million.

Appellees also presented evidence showing that TWE charged Flags for expenses that were not allowed under the partnership agreement. TWE charged over $4 million of its corporate expenses—for example, executive lunches at New York's Tavern on the Green and luxury automobiles for TWE executives—to the partnership. TWE also overcharged Flags for the Viper roller coaster by almost $1.4 million. Adding these damages to those attributed to the lost Coca-Cola fee, lost park income, and lost park value, appellees' damages expert estimated that Fund and Flags together suffered $239,363,642 in economic damages over the years appellants acted as general partner.

1. In three enumerations of error, Appellants argue the trial court should have directed a verdict or judgment notwithstanding the verdict with respect to certain defendants and claims. A directed verdict is appropriate "only if there is no conflict in the evidence as to any material issue and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular verdict. OCGA § 9-11-50 (a)." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 137(1), 508 S.E.2d 646 (1998). The same standard also applies to our review of the trial court's decision to deny appellants a judgment notwithstanding the verdict. *Id.*

(a) Appellants contend the evidence adduced was insufficient to support the jury's finding that they breached the fiduciary duty owed Flags and Fund. We disagree.

Fiduciary duties and obligations are owed by those in confidential relationships, that is, relationships "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." OCGA § 23-2-58. See *Atlanta Market Center Mgmt. Co. v. McLane*, 269 Ga. 604, 606(1), 503 S.E.2d 278 (1998). Appellants admitted and the evidence shows that SFOG was a general partner with such fiduciary duties. Moreover, as for the reasons set forth in Division 1(b), TWE, SFTP, and SFEC were also liable for any breach of SFOG's fiduciary duty.

We conclude that the evidence, viewed in the light most favorable to the jury's verdict, showed that appellants engaged in self-dealing conduct that specifically harmed appellees. For example, appellants kept secret profits derived from the sale of a partnership asset, the exclusive right to sell Coca-Cola products in the park. This was a breach of

fiduciary duty. See *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 95(1), 179 S.E.2d 88 (1970); see also OCGA § 14-8-21 ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from . . . any use by him of its property."). There was also evidence which could support the conclusion that the general partner engaged in self-dealing by depressing the value of the park by under-investing in it and then withholding information so that it could acquire the park at a discount. This was also a breach of fiduciary duty. See *Ledbetter v. Ledbetter*, 222 Ga.App. 858, 861(1), 476 S.E.2d 626 (1996); see 59A AmJur2d, Partnerships, § 443. Because the evidence supports the jury's verdict, we will not disturb it.

(b) Appellants contend the trial court should have directed a verdict in favor of "non-partner defendants" SFTP, SFEC, and TWE because only the subsidiary SFOG, as the named general partner corporate entity, owed Fund and Flags a fiduciary duty. We cannot agree.

Appellants' argument is founded upon the premise that appellees failed to adduce evidence imputing liability to TWE, SFTP, and SFEC, the parent corporations, for subsidiary SFOG's acts under alter ego, agency, or joint venture theories. However, whether the parent corporations were vicariously liable under any of these theories for SFOG's acts was not the main basis of liability argued below. Rather, the appellees argued at trial, as they do now on appeal, that the parent corporations aided and abetted SFOG in a breach of its fiduciary duties.

Although this court has never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty, see *Munford v. Valuation Research Corp.*, 98 F.3d 604, 613 (11th Cir. 1996), we have at least twice implicitly acknowledged that such claims are viable. See *Williams v. Svc.*

Corp., 218 Ga.App. 10, 459 S.E.2d 621 (1995), and *U3S Corp. v. Parker*, 202 Ga.App. 374, 380(4), 414 S.E.2d 513 (1991) ("issues remain to be tried" on the count alleging two defendants "aided and abetted the other two defendants' breach of fiduciary duty"). We have explicitly "acknowledged an aiding and abetting cause of action in torts involving violence, the sale of unregistered securities, breaches of covenants with employment contracts, and fraudulent conveyances." *Munford v. Valuation Research Corp.*, 98 F.3d at 613. And, we have also recognized an aiding and abetting cause of action in many cases involving the misapplication of trust funds. See, e.g., *Adams v. McGehee*, 211 Ga. 498, 500(4), 86 S.E.2d 525 (1955). Further, other jurisdictions have specifically found that such a cause of action is implicit in their existing case law governing the liability of persons acting in concert. See, e.g., *Granewich v. Harding*, 329 Or. 47, 54-58, 985 P.2d 788 (1999); *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994). Were we required to address this issue, we could follow suit, finding that such a basis for liability is implicit in OCGA § 51-12-30, pertaining to the joint liability of one who procures an actionable wrong. However, because appellants conceded an aiding and abetting theory of liability for breach of fiduciary duty claims at trial, error, if any, was induced. Moreover, because appellants have not enumerated as error the jury's finding of liability on this theory, we lack jurisdiction to consider it.

Appellants' Request to Charge No. 39, entitled "Liability of Other Defendants," specifically contained as one of three alternate bases of liability that "Defendant SFOG, Inc. was substantially aided by another Defendant[.]" Further, after the trial court charged the jury with respect to one who "aids or assists" in a breach of fiduciary duties, appellants' counsel failed to except to the charge on the ground that Georgia law does not recognize a claim for aiding a breach of fiduciary

duties. Instead, counsel complained only that the trial court did not insert the word "substantially" before "aids." Appellants have not enumerated the giving of this charge as error or the jury's finding of liability on this basis as error.

"It is well settled that a party cannot complain of an appellate ruling, order, or judgment that his own legal strategy, litigative procedure, or conduct aided in causing." (Citations omitted.) *Strong v. Wachovia Bank*, 215 Ga.App. 572, 573(2), 451 S.E.2d 524 (1994). Moreover, this court lacks jurisdiction to consider inadequately enumerated grounds. OCGA § 5-6-40; *Meeks v. State*, 178 Ga.App. 9, 14(4), 341 S.E.2d 880 (1986). Consequently, we will not address the validity of this basis for liability, but note only that if we did, the evidence adduced supports the jury's finding that appellants aided and abetted SFOG in a breach of fiduciary duty to Flags and Fund. See *Holmes v. Young*, 885 P.2d at 309.

(c) Appellants also contend the trial court erred in denying their motion for judgment n.o.v. on appellees' "capital improvements claims." Appellants argue that because the "Capital Improvements" provision of the Partnership Agreement required the general partner to spend at least $800,000 per year on capital improvements, and because appellants spent well in excess of that, they satisfied their capital improvement obligations to the partnership and the limited partner and consequently cannot be held liable for breaching their fiduciary duty to make capital improvements. See *Westminster Properties, Inc. v. Atlanta Assoc.*, 250 Ga. 841, 842-843(1), 301 S.E.2d 636 (1983).

Addressing these contentions required that the partnership agreement be construed to determine the general partner's obligations with respect to making capital improvements. In this case, the trial court submitted the partnership agreement

to the jury without construing it.[4] Although the court has a duty to construe contracts submitted to it, a new trial will not be granted where the contract is submitted to the jury and properly construed by it. *South Ga. Trust Co. v. Neal*, 174 Ga. 24(2), 161 S.E. 815 (1932). As explained below, we find that the partnership agreement required the general partner to make discretionary decisions in good faith as to the amount and type of capital improvements, and that there was evidence sufficient to support the conclusion that the general partner breached a duty to act in good faith in making these decisions. Because the jury verdict was consistent with this construction of the partnership agreement and with a finding that the general partner in concert with the other appellants acted in bad faith, we find no error.

"An issue of contract construction is at the outset a question of law for the court." *Grier v. Brogdon*, 234 Ga.App. 79, 80(2), 505 S.E.2d 512 (1998). The first step is to look to the four corners of the instrument to determine the meaning of the agreement from the language employed. *Terry v. State Farm &c. Ins. Co.*, 269 Ga. 777, 778-779(2), 504 S.E.2d 194 (1998). If the contract language is ambiguous, however, then the court must apply the applicable rules of construction. *Grier v. Brogdon*, 234 Ga.App. at 80, 505 S.E.2d 512; OCGA § 13-2-2. "The cardinal rule of contract construction is to ascertain the intention of the parties." (Punctuation omitted.) *Amstadter v. Liberty Healthcare Corp.*, 233 Ga. App. 240, 242(1), 503 S.E.2d 877 (1998); OCGA § 13-2-3. If, after applying the rules of construction, the language

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[4] Appellants argued they met their capital improvement obligations under the partnership agreement in a motion for summary judgment, in their trial brief, in their motion for directed verdict, and their motion for judgment n.o.v. The court denied the motions without opinion.

remains ambiguous, then the finder of fact must resolve the ambiguity. See id.

The contract provision at issue sets a capital improvements "minimum," a floor beneath which spending on capital improvements for any calendar year cannot fall.[5] "Minimum" here means "the least quantity, amount." Random House Dictionary of the English Language (1980), p. 571. It does not mean "only," which means "solely," or "exclusively." *See L & B Constr. Co. v. Ragan Enterprises*, 267 Ga. 809, 813, 482 S.E.2d 279 (1997). Consequently, this provision means that the general partner must make *at least* $800,000 in capital improvements in a calendar year and not *only* $800,000 per calendar year. The provision does not state that the general partner cannot or should not cause more to be invested. Further, the "carry forward" portion of the provision only lowers or eliminates the annual minimum capital improvements requirements for up to two years under certain conditions. It does not set what the general partner should invest in the park in any given year.

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[5] The Partnership Agreement provides:

> 5. *Capital Improvements*. The General Partner, regardless of whether or not any Capital Improvement Funds have been set aside for the calendar year, will cause the limited partnership in each calendar year beginning on or after January 1, 1971, to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately proceeding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000; provided that, if Capital Improvements actually made during any calendar year exceed the minimum amount herein specified, the excess difference between such minimum amount and the amounts actually expended may be carried forward for two subsequent years as a credit against the obligation of the General Partner to make such minimum Capital Improvements.

Salkin testified that this particular contract provision was added in the early 1970s because the general partner at the time was on the verge of bankruptcy and the partnership was concerned "that the park be maintained appropriately." The contract provision was intended to require the general partner to invest "separate and apart from the partnership" at least $800,000 of its own money in improvements. This provision "had nothing to do with whether the partnership, what [the] partnership would bill[,] but if the partnership didn't have enough money, the general partner would at least put in that [$800,000] as a loan so that the park could be maintained at that time."

Although the partnership agreement does not specify in dollars what the general partner should cause to be invested in the park each year, it gives the general partner exclusive control over the management of the park and the right to set aside and spend capital improvement funds from the gross revenues generated by the park as are necessary to advance the purposes of the partnership. The agreement provides that these purposes include repairing, maintaining, improving, and operating the park, and conducting amusement activities for family entertainment. Nothing in the agreement evinces an intent to give the general partner absolute or uncontrolled discretion as to the amount to be spent on capital improvements or the type of capital improvements to be made. Rather, it may be fairly implied from the agreement as a whole that the general partner was required to exercise discretionary judgment in these matters in good faith.

Where an agreement gives a party discretionary decision-making power, and such power is not left to the absolute or uncontrolled discretion of the party, the discretion is subject to an implied obligation that it be exercised in good faith. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. 591, 594, 188 S.E.2d 405 (1972); *Automatic Sprinkler Corp.*

&c. v. Anderson, 243 Ga. 867, 868-869, 257 S.E.2d 283 (1979). Furthermore,

> Laws in existence at the time a contract is executed are part of that contract. Already in existence at the time the partnership in question here was created was the provision in OCGA § 23-2-58 that partners owe a duty to act in the "utmost good faith" with regard to each other.

(Citation and punctuation omitted.) *Wilensky v. Blalock*, 262 Ga. 95, 98(3), 414 S.E.2d 1 (1992). Therefore it follows that the partnership agreement at issue here included, as a matter of law, that the general and limited partner had a fiduciary duty to act in utmost good faith toward each other. Id. Because the capital expenditures provision, construed in context, did not expressly give appellants the right to limit capital expenditures to only $800,000 per year, it did not relieve the general partner's duty to act in the utmost good faith. Id. See also *Southern Business Machines v. Northwest Financial Leasing*, 194 Ga.App. 253, 256(2), 390 S.E.2d 402 (1990).

Moreover, the evidence shows that appellants never interpreted the capital expenditures provision to mean they only had to invest $800,000 per year. TWE executive Daly testified that appellants knew they had a duty to maximize the performance of the partnership parks. Although appellants presented evidence that they exceeded the $800,000 yearly minimum by spending $23.8 million in capital investments in the Georgia park during the seven-year tenure of the general partner, whether the amount and type of capital investments which were made satisfied the fiduciary duty to act in good faith was a question of fact for the jury under the circumstances of this case. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. at 594, 188 S.E.2d 405.

The partnership agreement required that the general partner perform its managerial responsibilities by determining in good faith the amount of yearly capital improvements to be made in excess of the $800,000 minimum, if any, and how the funds for capital improvement were to be spent. Evidence was presented that during its seven-year tenure the general partner either delayed or failed to make capital improvements in major thrill rides, which were the most important type of capital investment in terms of maintaining and improving the park's profitability and value. In conjunction with this evidence, additional evidence was presented from which the jury could conclude that the general partner exercised its discretion in these areas, not in good faith, but as part of a plan to under-invest in the park to suppress its value so that appellants could buy the park for a reduced price. Although the general partner presented evidence that it acted in good faith under the terms of the agreement, there was evidence to support a contrary conclusion that the general partner, in concert with the other appellants, acted in bad faith in violation of responsibilities under the agreement and fiduciary obligations to the partnership, by failing to make the amount or type of capital improvements which would have maintained and improved the profitability and value of the park.

Because the jury's verdict is consistent with this view of the evidence, we find no error.

2. (a) Appellants argue the trial court erred in charging the jury as follows:

> Should you find that one or more of the defendants breached any fiduciary duties to the plaintiffs, if you find that the defendants acted in good faith and in a manner that was consistent with the contractual obligations and its fiduciary duty under the general partnership law when taking such actions, you must find for the defendants.

Appellants contend the charge is contradictory. The charge is taken from Defendant's Request to Charge 34. During the charge conference, the court, with assistance from defense counsel, edited the charge by deleting the paragraphs which came before and after the portion of the charge actually given. And, with the input of counsel, the court added certain phrases until the instant charge was crafted. After the entire charge was read to the jury, defense counsel excepted, objecting only to the court's addition of the phrase "and its fiduciary duty under the general partnership law" because that was "redundant and inconsistent and makes the charge confusing." However that phrase was, in substance, the very phrase appellant's counsel suggested adding. Error in the charge, if any, was self-induced and cannot be complained of on appeal. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga. App. 622, 623(2), 522 S.E.2d 661 (1999); *Levin v. State*, 222 Ga.App. 123, 125(3), 473 S.E.2d 582 (1996). Moreover, "where an entirely different objection is argued in a brief, as here, than was asserted at trial, we will not consider it." *Beck v. State*, 235 Ga.App. 707, 709-710(3), 510 S.E.2d 368 (1998). Finally, appellants never contended at trial, by objection or otherwise, that the charge was an incorrect statement of the law. The objection voiced was not sufficiently specific to apprise the court of error pursuant to OCGA § 5-5-24. Accordingly, any claim of error was waived. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga.App. at 625-626(7), 522 S.E.2d 661.

(b) Appellants also contend that a paragraph from the trial court's 13-page instruction on fiduciary duty contained an allegedly burden-shifting charge. However, appellants have not shown that a proper exception to the charge was made and we find no such exception in our review of the record. Error, if any, was not preserved for our review. *Johnson v. Bruno's, Inc.*, 219 Ga.App. 164, 166(4), 464 S.E.2d 259

(1995). Further, appellants have not argued, nor has our review of the charge revealed, that a "substantial error" within the meaning of OCGA § 5-5-24 (c) was committed.

3. Appellants assert in four separate enumerations and throughout their brief that the trial court made numerous evidentiary errors that "hopelessly infected" the trial. To the extent appellants make a cumulative error argument, we reject it. See *Laney v. State*, 271 Ga. 194, 198(11), 515 S.E.2d 610 (1999). The decision to admit or exclude evidence lies in the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. See *Dept. of Transp. v. Mendel*, 237 Ga.App. 900, 902(2), 517 S.E.2d 365 (1999).

(a) (i) Appellants contend the trial court erred in granting appellee's motion in limine to exclude: (1) evidence that Flags was created as a tax shelter, and (2) evidence of the tax consequences to Fund and its investors if the general partner caused more than $800,000 per year to be spent on capital improvements. Appellants argue that this evidence was critical to its defense that the general partnership made only moderate capital improvements in order to generate "tax losses," which was, according to their interpretation of the partnership agreement, what Fund and its investors actually wanted. Appellants overstate the substance of the court's ruling.

The court, adopting the recommendation of the special master, agreed that certain defense themes were irrelevant and prejudicial. Specifically, the appellants were instructed not to inquire into Fund's *individual investors'* wealth, motives for investing, including any tax consequences to them, or on their return on investment. And, appellants were not permitted to inquire into Fund's return on investment, including any tax benefits, *prior to* the time appellants assumed responsibility

for managing the park. Appellants were allowed to, and did, cross-examine Salkin on the tax consequences to Fund of capital investments in the park and presented their own expert testimony covering those points. We see no evidence that appellants were prohibited from making the argument they now advance. Rather, it appears appellants made a strategic decision to argue that the general partner invested much more in the Georgia park than it was obligated to under the partnership agreement because that defense theme was more consistent with the evidence actually adduced from appellants' own witnesses. For example, Bob Pittman testified that he understood the partnership agreement required "some minimum amount" of annual capital investment, however, "every year we greatly exceeded that amount and we weren't even close to being near the minimum." Because appellants were able to present the evidence they contend was excluded, they have failed to show how they were harmed by the court's ruling. Consequently, appellants have not shown reversible error. See, e.g., *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. 365, 371-372(6), 508 S.E.2d 716 (1998) (harm as well as error must be proven).

(ii) The trial court properly excluded a document Fund's lawyers filed with the California Department of Corporations. That document, which contained statements about the return on Fund's investment in the Six Flags theme park and the success of the investment over its lifetime, was not indicative of appellants' performance as general partner and was of dubious relevance to the issues at trial. We see no abuse of discretion. See *Kicklighter v. Woodward*, 267 Ga. 157, 161(4), 476 S.E.2d 248 (1996). Moreover, in light of the fact that appellants established how much Fund originally invested in the Georgia park, how much the park sold for in 1997, and how much Fund received in free cash flow both before and during appellants' tenure as general partner, we do

not believe appellants were harmed by the exclusion of this document. See *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(iii) The trial court properly excluded "a calculation" pertaining to the value of the new partnership agreement made by Salkin's son, Kenneth. Because the younger Salkin, a college student, did not have the education, training, or experience necessary to give a theme park valuation, the trial court did not abuse its discretion in excluding his calculations. See OCGA § 24-9-67; *Martin v. Baldwin*, 215 Ga. 293, 297(2)(c), 110 S.E.2d 344 (1959).

(iv) Appellants contend the trial court erred in excluding "an admission" by a Fund attorney that the Fund's new general partnership agreement with TWE was a "grand slam plus." The statement was not "excluded"; rather, the trial court denied appellants' motion to compel a document in which the statement was allegedly made on the ground that the document was privileged. Pretermitting whether the document was erroneously withheld, the transcript reveals that appellants, through TWE executive Ross, were able to show that the same Fund attorney admittedly believed "that the Fund had gotten a very, very rich deal." Because appellants have failed to show they were harmed by the exclusion of the complained-of statement, we find no error. *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(b) On November 17, 1998, the first day of trial, the judge entered an order which prohibited appellants from offering evidence tracing the flow of the $20 million Coca-Cola sponsorship fee as a sanction for discovery abuse. Appellants contend this was an unwarranted, or at least disproportionate, sanction. Appellants' arguments are not supported by the record.

On November 10, 1998, the trial court, adopting the Special Master's November 6, 1998 findings and recommendation with respect to this discovery dispute, found that appellants "willfully attempted to obstruct, in violation of court orders," appellees' efforts to obtain the identities of and to take the depositions of witnesses who were knowledgeable about the flow of the Coca-Cola funds in connection with the recapitalization of SFTP and the closing of the stock purchase. The court found that appellants, instead of identifying or producing a witness for deposition, simply suggested that the person or persons sought were either employed with Chase Manhattan Bank or the firm of Lazard Freres; appellants stated they intended to "subpoena someone from Chase Manhattan Bank next week" and invited appellees to attend the deposition, once it was scheduled. Finding this effort at compliance inadequate, and in light of appellants' prior attempts "to obstruct discovery," the court ordered that the unnamed Chase Manhattan Bank witness would not be deposed until appellants specifically identified those persons most knowledgeable about the issues specified in appellees' OCGA § 9-11-30(b)(1) notice. The court further ordered appellants to produce instanter those bank records which appellees had requested and identified by specific account number well over a year before, records which had been ruled discoverable and which should have been produced by February 28, 1998. Appellants were warned that failure to comply with the court's order would result in their being precluded from offering evidence on this issue.

On November 12, 1998, appellants wrote appellees and offered as a deponent a lawyer who had been involved in the SFTP stock purchase, but who had "no relevant documents in his possession." Moreover, this person was not available to be deposed until November 15, 1998, two days before trial. Most significantly, however, appellants failed to produce the

requested bank records, arguing "there are no documents at Time Warner. There are no documents apparently at Chemical or Chase. They have been destroyed either in the ordinary course of business or through other reasons." Appellees did not depose the offered witness since doing so without the requested documents would be futile. After a hearing on appellees' motion for sanctions, the trial court found that appellants "willfully obstructed and failed to comply with the Court's Order of November 10, 1998" and, as the court had warned it would do, precluded appellants from offering evidence on the flow of the Coca-Cola sponsorship fee funds.

Trial courts have broad discretion to control discovery, including the imposition of sanctions. *Daniel v. Corporate Property Investors*, 234 Ga.App. 148, 505 S.E.2d 576 (1998). Absent a showing of a clear abuse of discretion, a court's exercise of that broad discretion will not be reversed. *Id.* Pretermitting whether appellants identified a deponent responsive to the OCGA § 9-11-30(b)(1) request and therefore made a good faith effort to comply with that part of the court's order, it is clear to us that such a deposition, without reference to the requested documents, would have been of little value. More importantly, though, it plainly does not satisfy the court's express order to produce the requested records. Appellants previously produced bank records, including a "boxful" of bank records on one account, and yet they could not locate these particular records and offered no credible reason for that failure. In fact, the judge could infer from the documents and arguments presented at the hearing that appellants did not undertake a timely or thorough search for the requested records they claimed were destroyed even though they had had over a year to do so. That conclusion was justified when two weeks into trial, some of the requested records were inexplicably found and produced.

OCGA § 9-11-37(b)(2)(B) specifically authorizes the court to prohibit a disobedient party from "introducing designated matters in evidence." Given the court's findings, which are supported by the evidence, we cannot say this sanction was unwarranted or disproportionate. See *Heyde v. Xtraman, Inc.*, 199 Ga.App. 303, 308, 404 S.E.2d 607 (1991). We find no abuse of discretion. See *Tompkins v. McMickle*, 172 Ga.App. 62, 64(2), 321 S.E.2d 797 (1984).

(c) Appellants argue the trial court erred in allowing appellee to present evidence of "unrelated claims" or "unrelated bad acts," for example, that appellants withheld financial projections or planned to build a competing theme park. Pretermitting whether this evidence can be labeled "unrelated" in a suit alleging an intentional breach of fiduciary duties and of the partnership agreement's implied duties of good faith and fair dealing, appellants did not object to any of this evidence when it was offered. Error, if any, was not preserved for our review. See *MARTA v. Green Intl.*, 235 Ga.App. 419, 425-426(3)(b), 509 S.E.2d 674 (1998); see also *Frostgate Warehouses v. Cole*, 244 Ga. 782, 783, 262 S.E.2d 98 (1979).

Moreover, even if this evidence could be considered similar transaction evidence, it would be relevant to show appellants' motive, intent, or bent of mind. *Troncalli v. Jones*, 237 Ga.App. 10, 15-16(4), 514 S.E.2d 478 (1999). Appellees requested that a limiting instruction on similar transaction evidence be given, but appellants successfully objected to it and did not request one of its own. Appellants may not now complain that the trial court granted its request. See *Bone v. State*, 178 Ga.App. 802, 806, 345 S.E.2d 46 (1986).

(d) Appellants argue the trial court erred in admitting improper testimony from Salkin. Appellants cite to 17 excerpts

from Salkin's testimony, arguing that he was allowed to give evidence that was either outside his personal knowledge or which constituted a legal opinion. We have reviewed those excerpts which were accompanied by specific and timely objection and find that Salkin's answers were based upon his personal knowledge and that he gave no improper opinion testimony or testimony which invaded the province of the jury. See OCGA § 24-9-65; *Ivy Inn v. MARTA*, 175 Ga.App. 580, 584(4), 334 S.E.2d 319 (1985). Further, any error was rendered harmless by the trial court's instruction to the jury that the credibility of witnesses and the weight of the evidence were for their determination. See *Phelps v. Huff*, 214 Ga.App. 398, 403(2)(b), 448 S.E.2d 64 (1994).

4. Appellants contend the trial court made statements in front of the jury which impermissibly impugned the credibility of defense witnesses. Of the eleven record citations referenced in appellants' brief, nine were the court's instructions to witnesses to answer counsel's questions with a "yes" or a "no" before giving an explanation. One statement was a reminder that the court must give permission before a witness is allowed to leave the witness stand. Appellants objected to none of these statements.

The only statement to which appellants interposed an objection was a statement made by the court that the jury "take notice of the fact" that testimony given by Bob Pittman was "evasive." The court interrupted the cross-examination of Pittman at a point where Pittman responded to a question asking if a purchase by a company named Boston Ventures of 51 percent of what TWE owned in a Six Flags organization had triggered his receipt of a sum of money pursuant to a contract. Pittman responded that his receipt of the money was "technically" not triggered by the purchase made by Boston Ventures because, "It could have been anybody buying it would have triggered the contract," and therefore "It was not

Boston Ventures that triggered it." The court interrupted at that point and began to question Pittman.

> THE COURT: Mr. Pittman, I usually just kind of sit over here and don't say much. The last colloquy that I heard went something like this, did Boston Ventures trigger your contract, you getting whatever you got, and you said technically, no, it could have been anybody; but it wasn't anybody. It was Boston Ventures, right?
>
> PITTMAN: That's correct.
>
> THE COURT: If it was Boston Ventures and if I know how to read and write, then who triggered your contract?
>
> PITTMAN: Boston Ventures.
>
> THE COURT: Amen. I'm going to give you another piece of advice. I want simple answers that an old Boy from Georgia can understand. I don't want anymore of this. Now, you know better than that. That, to me, is double-talk and you would not want me to be upset with you, trust me. Now, answer his question and I want you to answer it right the next time.
>
> PITTMAN: Yes sir.
>
> THE COURT: I'm going to ask the jury to take notice of the fact that this witness was evasive.

First, we conclude that the objected-to comment by the court was not an expression of opinion as to what facts had or had not been proved, therefore no reversal is required under OCGA § 9-10-7. Rather, the court expressed its opinion that the witness was not responding to the question being asked and was being evasive. *Walker v. Bishop*, 169 Ga.App. 236, 242, 312 S.E.2d 349 (1983); *Simmons v. State*, 138 Ga. 137, 74 S.E. 1000 (1912). Moreover, we do not believe the court's statement commented on the credibility of the witness.

Compare *Griffin v. State*, 142 Ga.App. 362, 363-364, 235 S.E.2d 724 (1977), vacated on other grounds, 240 Ga. 470, 241 S.E.2d 230 (1978); *Speagle v. Nationwide &c. Ins. Co.*, 138 Ga.App. 384, 385, 226 S.E.2d 459 (1976); *Carver v. Leach*, 53 Ga.App. 112, 115, 185 S.E. 155 (1936), in which we concluded that the courts' improper comments on the credibility of the witnesses in those cases required reversal. In *Griffin*, the court made statements which implied or expressed that the witness was lying. In *Speagle*, the court's statements that the witness was "equivocating" and "has changed her testimony once or twice" expressed an opinion that the witness was not being truthful. In *Carver*, the court not only stated that the witness was evading the questions but made additional statements implying that the witness knew the truth and was not telling it.

Although the foregoing cases, and particularly *Carver*, present a close question as to whether the court commented on Pittman's credibility, we conclude that the court's comment, taken in context, was not directed at Pittman's overall credibility as a witness, nor did it imply that Pittman was being untruthful. The court expressed its opinion that Pittman was being evasive by not responding directly to the particular question. See *Saladine v. State*, 169 Ga.App. 425, 313 S.E.2d 714 (1984). Accordingly, reversal is not required on the basis that the court expressed an opinion as to the credibility of the witness.

Although it was within the power of the court to exercise control over the witness to prevent unresponsive or evasive testimony, *Speagle v. Nationwide &c. Ins. Co.*, 138 Ga.App. 384, 226 S.E.2d 459, we nevertheless conclude that the objected-to statement made by the court to the jury was inappropriate and erroneous. See *Reed v. State*, 163 Ga. 206, 216, 135 S.E. 748 (1926). Under the circumstances, however, we find that the appellants have failed to demonstrate

that the comment was harmful and requires reversal. Although Pittman was a key witness, the court's statement was limited in scope to a single response by Pittman on a minor point, and the statement did not disparage Pittman's credibility in general. Moreover, the court's final charge thoroughly and properly instructed the jury on witness credibility and informed the jury that nothing the court "did or said during the course of this trial" was intended to "intimate, hint or suggest to you which of the parties should prevail in this case." Under these circumstances, the error was harmless. *Reid v. Harbin Lumber Co.*, 172 Ga.App. 615, 619(2), 323 S.E.2d 845 (1984); see also *CSX Transp. v. Barnett*, 199 Ga. App. 611, 612(1), 405 S.E.2d 506 (1991) (both harm and error must be shown to warrant reversal).

5. (a) Appellants argue the evidence on the issue of compensatory damages was insufficient to allow the jury to calculate the amount of compensatory damages to Fund[6] within a reasonable degree of certainty. As we have held:

> As to damages, a jury must be able to calculate the amount of damages from the data furnished and it cannot be placed in a position where an allowance of loss is based on guesswork. A jury must be able to calculate loss with a reasonable certainty. The party claiming damages carries not only the burden of proving the damages, but also furnishing the jury with sufficient data to estimate the damages with reasonable certainty. It is not necessary, however, that the party on whom the burden thus rests should submit exact figures. The rule

---

[6] Although appellants state that a portion of the $48 million in damages awarded Flags was based on speculation, they fail to support that assertion, offering argument which is pertinent only to the award of damages to Fund. Consequently, we deem this enumeration of error, as it applies to Flags, abandoned. Court of Appeals Rule 27(c)(2).

> against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted.

(Citations and punctuation omitted.) *CSX Transp. v. West*, 240 Ga.App. 209, 212-213(4), 523 S.E.2d 63 (1999).

In this case, experts for both sides were able to establish the value of the new partnership agreement to Fund at between $286 million and $300 million. Using appellants' own internal documents, appellees also were able to show a plan to under-invest in and thereby depress the value of the Georgia park. The evidence adequately demonstrated that the Georgia park did not receive capital improvements or maintenance comparable to appellants' wholly owned parks. Moreover, appellants documents revealed how much they typically invested in their wholly owned parks, following a "major/minor" plan for adding new attractions, thereby establishing a model for comparison. Using these documents and other information, appellees' expert on theme parks was able to calculate—using the multiple of EBITDA formula common to the industry—what an investor would have been warranted in investing in the Georgia park had it been managed and invested in the same manner as comparable parks during appellants' tenure as general partner. That warranted investment was estimated at between $442 million and $458 million. Based upon this information, appellees' accountant opined that, as a result of appellants' misconduct, Fund lost between $142 and $172 million on the new partnership deal. This evidence was sufficient to allow the

jury to calculate damages to Fund caused by appellants with reasonable certainty. See *CSX Transp. v. West*, 240 Ga.App. at 212-213(4), 523 S.E.2d 63; *Intl. Indem. Co. v. Regional Employer Svc.*, 239 Ga.App. 420, 422-423(4), 520 S.E.2d 533 (1999).

(b) Appellants also argue the award of compensatory damages to Fund and Flags was excessive. As shown above, the $149 million award to Fund was well within the range of evidence; consequently, we will not disturb it. See *Crawford v. Presbyterian Home*, 216 Ga.App. 54, 56(5), 453 S.E.2d 480 (1994); see also *Whitley v. Ditta*, 209 Ga.App. 553, 554-555(2), 434 S.E.2d 108 (1993).

Appellees also presented evidence showing that Flags was charged $4.8 million in improper inter-company allocations, that it was overcharged by $1.3 million for the Viper roller coaster, and that it never received its $2.8 million share of the Coca-Cola sponsorship fee. Flags also lost between $12 million and $15 million in income attributable to the delay in installing Batman the Ride. And, appellees presented testimony that appellants used Flags' share of the Coca-Cola money to acquire an interest in SFTP, which was sold at a substantial profit. Appellees' accountant determined that Flags' share of that return on investment amounted to $26.3 million. Appellees' accountant opined Flags lost, as a result of appellants' misconduct, over $50 million. Because the $40.8 million awarded to Flags was within the range of evidence, we will not disturb it. *See Crawford v. Presbyterian Home*, 216 Ga.App. at 56(5), 453 S.E.2d 480.

6. (a) Appellants argue punitive damages were not authorized by the evidence because appellees proved no aggravating or outrageous circumstances or fraud. Punitive damages, however, are awardable in tort actions in which the plaintiff proves by clear and convincing evidence that a defendant's

actions demonstrated "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." OCGA § 51-12-5.1(b).

Appellees presented evidence that TWE, SFTP, SFEC, and SFOG executives were aware of their fiduciary duty to appellees but consciously and intentionally disregarded that duty. As Bob Pittman tellingly stated, TWE was "not interested in being in the business of managing assets for others." Rather, it was in the business of putting together business deals that would profit the company. And, to accomplish that, the appellants withheld vital business information from Flags and Fund, undertook to compete with them, took money belonging to them, and carried out a plan to depress the value of their investment, the Six Flags Over Georgia Park. This evidence authorized the jury to find by clear and convincing evidence wilful misconduct that supported an award of punitive damages. We find no error. See *Elliott v. McDaniel*, 224 Ga.App. 848, 854(5), 483 S.E.2d 104 (1996), rev'd on other grounds, 269 Ga. 262, 497 S.E.2d 786 (1998); *Daniell v. Clein*, 206 Ga.App. 377, 383(3), 425 S.E.2d 344 (1992).

(b) Appellants argue that the trial court erred by failing to instruct the jury, "that the requisite separate finding that Defendants acted with 'specific intent to cause harm' [also] had to be proved by clear and convincing evidence." Appellants have cited no authority, and we have found none, requiring the court to give such a charge. The trial court properly charged the jury on the law pertinent to awarding punitive damages under OCGA § 51-12-5.1(b), including the requisite "clear and convincing evidence" burden of proof, and whether appellants acted with specific intent to cause harm. We find no error.

(c) Finally, appellants argue the punitive damages award was excessive under Georgia law.

"Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." (Citation and punctuation omitted.) *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 161, 164(1)(e), 473 S.E.2d 256 (1996); OCGA § 51-12-5.1(a). An award of punitive damages will not be disturbed on appeal unless it is "so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." (Citation and punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga.App. 619, 620, 507 S.E.2d 168 (1998). The $257 million punitive damages award was roughly 1.3 times the $197 million in compensatory damages. Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias. See *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 164(1)(e), 473 S.E.2d 256. Given a 1.3-to-1 ratio, we cannot say that the award was excessive as a matter of law. See *Hosp. Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614(1), 409 S.E.2d 501 (1991) (260-to-1 ratio upheld). We find no error.

Judgment affirmed.

ANDREWS, P. J., and RUFFIN, J., concur.

APPENDIX B

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Civil Action File No. 97-A-01939-1

SIX FLAGS OVER GEORGIA L.L.C. ET AL.

V.

TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL.

[Apr. 22, 1999]

ORDER ON DEFENDANTS' AMENDED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The above-styled case having come before the Court for hearing on March 17, 1999 on Defendants' Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and after hearing argument of counsel and upon consideration of the briefs and all evidence of record, the Court enters the following findings of fact and conclusions of law.

The standard of review on a judgment notwithstanding the verdict is the same as on a directed verdict. "If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom shall demand a particular verdict, such verdict shall be directed." O.C.G.A. § 9-11-50(a); *Bagley v. Robertson*, 265 Ga. 144 (1995). The evidence and all reasonable deductions therefrom fail to demand a verdict in favor of Defendants.

Therefore, Defendants' amended motion for judgment notwithstanding the verdict is DENIED.

It has been repeatedly held that the general grounds for a new trial are directed solely to the discretion of the trial judge. *Durrett v. Farrar*, 130 Ga. App. 298 (1973), *United Services Automobile Association v. Gottschalk*, 212 Ga. App. 88 (1994). Pursuant to O.C.G.A. § 9-11-60(c), the Court finds no intrinsic defect relating to the jury verdict. Viewing the evidence in the light most favorable to the verdict, the verdict is supported by the evidence, and is not contrary to legal principles or the weight of the evidence.

Further, Defendants raise the following additional grounds:

1. Awards of compensatory damages and punitive damages, both separately and collectively are clearly excessive;
2. Verdicts were based on evidence illegally admitted and illegally excluded;
3. Court failed to give certain jury charges and did not give jury charges adjusted to the evidence;
4. Court made improper comment; and
5. Court allowed Avram Salkin to give improper legal opinions.

The Court finds that the awards of compensatory and punitive damages, both separately and collectively are not so clearly excessive as to be inconsistent with the preponderance of the evidence. As to Defendants' claim that the verdicts were based on illegally excluded and illegally admitted evidence, the parties exhaustively briefed these issues in its motions in limine. The Court reviewed these briefs extensively and issued its rulings prior to trial. The Court now affirms those rulings and is not persuaded that Defendants

have presented any argument or law which would deem those original rulings reversible error, thereby requiring a new trial.

Defendants' remaining contentions are without merit. As such, Defendants' motion for new trial is DENIED.

SO ORDERED, this April 22, 1999.

/s/ James W. Oxendine
JAMES W. OXENDINE, Judge
Gwinnett Superior Court

APPENDIX C

COURT OF APPEALS
OF THE STATE OF GEORGIA

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.

[July 27, 2000]

The Court of Appeals hereby passes the following order:

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William L. Martin, III

APPENDIX D

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Case No. S00C1969

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.

[Jan. 18, 2001]

COURT OF APPEALS CASE NO. A00A0120

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

APPENDIX E

SUPREME COURT OF GEORGIA
ATLANTA

Case No. S00C1969

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

V.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.

[Feb. 16, 2001]

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, J., who dissents.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 00A725

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.,
Applicants,

v.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.,

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the response thereto, and the reply,

IT IS ORDERED that the remittitur of the Court of Appeals of Georgia in case No. A00A0120, be stayed as to punitive damages pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court or further order of the Court.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme Court of the United States

Dated this 1st Day
of March, 2001

FILED
AUG 13 2001
CLERK

No. 00-1875

In The

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, SCHERFFIUS, FRYHOFER, DAUGHTERY & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
ANDERSEN, DAVIDSON & TATE
P.O. Box 2000
Lawrenceville, Georgia 30246
(770) 822-0900

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to grant, vacate, and remand a case coming here from a Georgia appellate court where Petitioners now challenge the standard of review on appeal of the trial court's determinations about a punitive damages award, but where that challenge was never presented to or decided by the Georgia appellate court because Petitioners affirmatively requested the standard of review that the appellate court applied.

2. Whether an award of punitive damages is invalid under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), where the underlying breaches of fiduciary duty are clearly reprehensible, where such conduct could trigger severe criminal and civil penalties that include treble damages, and where the ratio of punitive to compensatory damages is only 1.3 to 1, but where the Georgia court did not expressly compare this punitive damages award to comparable civil and criminal penalties because Petitioners never presented that issue to the Georgia court by asking it to draw that comparison.

3. Whether this Court has jurisdiction to review a notice-based due process challenge to the imposition of punitive damages for conduct that was illegal under state law where that due process challenge was neither presented to nor decided by the Georgia court and where the Georgia court found that Petitioners had waived any challenge to liability for that conduct.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Six Flags Fund, Ltd. (L.P.) owns 99% of the membership interests in respondent Six Flags Over Georgia, LLC ("Flags"). No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Six Flags Fund, Ltd. (L.P.) ("Fund") is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags, Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags, Inc. are publicly held.

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BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

Respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The petition provides a woefully incomplete account of both the procedural history of this case and the record evidence.

As the Court of Appeals held, the "clear and convincing" evidence in this case demonstrates that Petitioners "consciously and intentionally disregarded" their fiduciary duties to Respondents when Petitioners "carried out a plan to depress the value" of the Six Flags Over Georgia amusement park "by under-investing in it and then withholding information so that [they] could acquire the park at a discount." Pet. App. 34a, 13a.

Petitioners, however, do much more than simply rewrite the facts found by the jury and the Court of Appeals in order to create evidentiary support where none exists. Their petition is virtually silent on – and therefore totally fails to satisfy their obligations under – Rule 14.1(g)(i) of this Court's Rules. That Rule requires them "to show that the federal question[s]" they raise in the petition were "timely and properly raised" in the Georgia courts.

Their abject failure to do this is particularly egregious with respect to Petitioners' Question 3 (reordered as Question 1 in this opposition) because Petitioners' goal is to join this case to the recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), and thereby to obtain a GVR. Questions 1 and 2 of the petition (reordered as Questions 2 and 3 here), even had they been properly presented to the Georgia courts, would be of no conceivable interest to

this Court. In *Cooper*, the Court held that the United States Constitution commands federal appellate courts to review *de novo* the trial court's determinations about a punitive damages award. The reality, however, is that the *Cooper* issue was never in this case and was never presented to or decided by the Georgia court. In fact, Petitioners *elected* not to present any *Cooper* issue when they requested that the Court of Appeals apply the very "abuse of discretion" standard which they now challenge. Accordingly, this Court has no jurisdiction to grant, vacate, and remand on the *Cooper* question.

To achieve their goal of obtaining a GVR based on *Cooper*, Petitioners have run roughshod over this Court's long-established rules on proper presentation both in their Application for Stay and in their petition. Faced with competing versions of the case and facts, without any record, and without the specter of any irreparable harm to Respondents were a stay to be granted, it is not surprising that this Court granted a stay.[1]

At the certiorari stage, however, Petitioners' advantages evaporate, and this Court must fully consider its jurisdiction.[2] This explains Petitioners' flight from *Cooper* and from their prior representations to this Court. Since their Application for Stay, the *Cooper* issue has gone from being first to third on Petitioners' list – and for good reason. There has never been any *Cooper* issue in this

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[1] Petitioners paid the compensatory damages award, leaving a bond almost twice the size of the remaining punitive damages award. In addition, the punitive damages award earns post-judgment interest at 12% per annum. *See* Application for Stay at 23-24, No. A-725 (filed Feb. 21, 2001) (hereinafter "Stay App.").

[2] Petitioners cannot suggest that the stay preordains a grant of certiorari. Their Application for Stay cited 11 cases in which this Court denied certiorari after stays had been granted. *See* Stay App. at 11 & n.7.

case, and Petitioners are not entitled to a GVR or any other relief.

Because Petitioners' attempt to create a *Cooper* question is transparently the gravamen of their petition, Respondents deal with that question first, and then turn to Petitioners' other two questions, which exhibit similar presentation problems and are otherwise clearly not certworthy.

JURISDICTION

As discussed fully in the reasons for denying the writ (*see infra* pp. 11-20, 24-25, 27-28), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Georgia Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes, and of the Georgia Constitution, are reproduced at Resp. App., *infra*, 1a-10a.

STATEMENT OF THE CASE

1. Between 1991 and 1997, Petitioners flagrantly abused their positions as general partner (or entities in control of that partner) of the Six Flags theme park in Atlanta, Georgia. They engaged in myriad intentional, wrongful acts in clear contravention of the fiduciary duties they owed to their partners. At the heart of their scheme was "a plan to under-invest in and thereby depress the value of the Georgia park" so that Petitioners could "acquire the park at a discount" once the

partnership agreement between Petitioners and Respondents expired in 1997. Pet. App. 32a, 13a, 8a.[3]

Internal memoranda and presentations revealed that Petitioners consciously planned to "milk" the Atlanta park by decreasing capital expenditures as the partnership agreement approached expiration. Pet. App. 9a.[4] Petitioners repeatedly assert that they were required by the partnership agreement to invest only $800,000 per year in capital improvements to the park, but the Court of Appeals explicitly rejected that interpretation of the partnership agreement as a matter of state law. As the Court of Appeals explained, not only did their devious strategy constitute an objective violation of Petitioners' "duty to act in good faith in making [capital improvement] decisions," but "the evidence shows that [Petitioners themselves] *never interpreted* the capital expenditures provision to mean they only had to invest $800,000 per year." Pet. App. 16a, 19a (emphasis added).

A clear example of Petitioners' scheme was their calculated decision, as highlighted by notes from a 1995 business meeting, to delay the installation of "Batman the Ride" in order to reduce Respondents' "leverage in negotiating with other potential strategic partners in 1998 and beyond." Pet. App. 10a.[5] Petitioners' starving the park of

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[3] Petitioners' own documents proved that, before buying a controlling interest in December 1991, Petitioners made plans to prevent the Georgia park from making major capital expenditures, while at the same time increasing the level of capital expenditures at Petitioners' wholly owned parks. Pet. App. 8a-9a.

[4] Petitioners imply that they generously "spent vastly more than the required $800,000" out of their own funds (Pet. 4 n.3), but "all capital expenditures" in fact "[came] from the park's [*i.e.*, Respondent Flags'] surplus cash flow." Pet. App. 6a.

[5] Contrary to Petitioners' misrepresentation that this decision stemmed from their fear "that the 1996 Olympics

capital expenditures, such as the Batman ride, depressed the park's value by more than $150 million, inducing consequently weak offers from competing bidders and allowing Petitioners to secure the park at a lower price at the end of 1997. *Id.* at 10a-11a, 8a, 32a-33a. The mechanics of the valuation were relatively straightforward, as "[c]apital investment in an amusement park, especially in major thrill rides, fuels EBITDA[6] growth, which in turn increases the value of the park." *Id.* at 8a. For example, the Batman ride was the most successful capital expenditure in the history of the Six Flags parks and had driven up EBITDA by 37 to 54 percent in the first year after it was installed at Time Warner's wholly owned parks in Chicago, New Jersey, Los Angeles, and St. Louis. *See id.* at 9a; PX 817 at 2; PX 970; PX 484 at 8. The evidence flatly discredits Petitioners' incredulity that appropriate capital expenditures "could logically boost the park's value by $150 million."[7] In any event, the amount of compensatory damages caused by Petitioners' bad acts has not been and cannot be challenged in this Court. Petitioners have paid the compensatory damages award in full.

In addition to depressing the earnings of the Atlanta park, Petitioners actively sabotaged Respondents' attempt to conduct a competitive auction by withholding and distorting financial information necessary to allow

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would draw crowds away from the park" (Pet. 7), the evidence at trial demonstrated that "the Olympics were *never* a factor in [their] decision." Pet. App. 10a (emphasis added).

[6] EBITDA is an acronym for "earnings before interest, taxes, depreciation, and amortization." Pet. App. 8a. Amusement parks are valued, bought, and sold based on a multiple of EBITDA. *Ibid.*

[7] *Compare* Pet. 7 (Petitioners' "incredulity") *with* Pet. App. 8a (Court of Appeals holding "[c]apital investment . . . increases the value of the park."); 10a, 11a, 32a (Court of Appeals discussions of how withheld capital expenditures resulted in the figure for decreased park value awarded by the jury).

other prospective bidders to value the park accurately. Pet. App. 10a-11a; *see also* PX 20 (internal instructions to be "niggardly" in responding to Fund's requests for information and to "flatten out" projections). They also engaged in a variety of other improper acts in violation of the fiduciary duties owed to their partners: they bought land "immediately adjacent" to the park, "thus limiting the park's expansion opportunities" (Pet. App. 5a); they used "confidential business information" from the park to "stud[y] the feasibility of developing a competing park" (*id.* at 6a); they signed employment contracts including non-competition clauses with "key park executives" that would become effective after the partnership ended (*id.* at 7a); and they "deferred" $7 to 10 million of maintenance (*ibid.*). Petitioners' malevolent role in this process (most of which was revealed only by this litigation) belies their idyllic claim that Respondents "voluntarily" entrusted them with management "for another thirty years." Pet. 5.[8]

Petitioners also engaged in other misconduct. For example, they charged more than $4 million of luxury expenses to the partnership in violation of the partnership agreement; they overcharged the partnership by almost $1.4 million for an obsolete minor attraction that was installed instead of the EBITDA-boosting Batman ride; and they contracted with Coca-Cola for a $2.8 million sponsorship fee that was not shared with the partnership and was actually used to finance Petitioners' investment in Six Flags parks (which $2.8 million taken from Respondents reaped a $26.3 million windfall for Petitioners). Pet. App. 11a, 33a.[9]

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[8] Petitioners' scheme worked: The limited partner had no viable alternative to signing a new management contract with Petitioners. Time Warner was the high bidder. Pet. App. at 10a-11a.

[9] Petitioners refer to "unequivocal" proof that the Coca-Cola funds were not used to finance the Six Flags acquisition

In sum, Petitioners were "aware" they owed a fiduciary duty to Respondents "but consciously and intentionally disregarded that duty." Pet. App. 34a.

2. This lawsuit was originally filed by Petitioner Six Flags Theme Parks Inc. (a subsidiary of Time Warner Entertainment) and the general partner, Petitioner Six Flags Over Georgia, Inc. Pet. App. 8a. *Petitioners themselves* chose the forum – a state court in suburban Atlanta. The trial court realigned and added parties. *Ibid.* After a six-week trial, the jury found all four Petitioners liable, awarding $197.3 million in compensatory damages. The jury found by special interrogatory that each Petitioner had acted with "specific intent to harm" and imposed $257 million in punitive damages. *Id.* at 2a & n.3.

After their post-trial motion was denied, Petitioners appealed to the Georgia Court of Appeals. In their briefs in that court, no excerpts of which are included in the appendix to the petition despite Petitioners' obligations under Rule 14.1(g)(i) of this Court, *see infra* p. 11 n.13, Petitioners made only vague challenges to the punitive damages award. Under the heading "The Punitive Damages Are Excessive," Petitioners' "Brief of Appellants" included only two sentences alleging any due process violations. They cited *BMW* only as limiting the amount

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(Pet. 8), but the Court of Appeals affirmed the trial court's exclusion of that alleged proof. Pet. App. 27a. The trial court excluded that alleged proof because Petitioners deliberately concealed it, in violation of court orders, an act which renders the alleged "proof" suspect. Pet. App. 24a-27a. Petitioners' Coca-Cola reference is only one of many instances in which they incant arguments that are totally unsupported by the record. For example, contrary to their assertion that "evidence that the parties' purpose was to create a tax shelter was suppressed" (Pet. 8), Petitioners in fact "presented their own expert testimony covering those points" and cross-examined Respondents' chief witness about them. Pet. App. 23a.

of punitive damages in cases involving "purely economic" harm; they made no reference at all to the "third guidepost" argument that forms the basis for Question 1 of their petition in this Court (reordered Question 2). Resp. App. 16a-17a. As for Question 2 of their petition in this Court (reordered Question 3), at no time did Petitioners assert or even insinuate to the Court of Appeals that the punitive damages award was constitutionally infirm because they lacked notice they could be liable for aiding and abetting breaches of fiduciary duty. Finally, with respect to their Question 3 (reordered Question 1), under the heading "Standard of Review," Petitioners *elected* not to urge that *de novo* review was constitutionally required; instead Petitioners requested the exact "abuse of discretion" standard they now challenge. Petitioners stated that "[t]his Court reviews for *abuse of discretion* rulings . . . for excessive damages." *Id.* at 16a (emphasis added).[10]

3. The Court of Appeals affirmed. Its opinion belies Petitioners' claim that the court restricted its punitive damages analysis "to a single factor: the ratio of punitive to compensatory damages." Pet. 13. Nearly half of the court's opinion set forth and explained the predicates for the first *BMW* guidepost – the reprehensibility of Petitioners' conduct. *See* Pet. App. 1a-13a, 17a-20a, 31a-35a. The Court of Appeals concluded that Petitioners had engaged in "wilful misconduct," delineating instances in which Petitioners "took money belonging to [Respondents]," "kept secret profits derived from the sale of a partnership asset," and "engaged in self-dealing conduct that specifically harmed [Respondents]." *Id.* at 34a, 12a.[11]

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[10] Petitioners' Reply Brief similarly devoted only two sentences to conceivably federal issues. *See* Resp. App. 19a.

[11] It is thus difficult to comprehend Petitioners' declaration that "[a]s for the other claims, petitioners showed that they had not misappropriated anything belonging to the partnership." Pet. 8.

The court also factored into its analysis the extremely low ratio – 1.3 to 1 – of punitive to compensatory damages, but made explicit that it did "not mechanically look to the ratio." *Id.* at 35a.

The Court of Appeals did not explicitly scrutinize the *trial court's* review of the award, as Petitioners made no argument on this point. The court instead confined its review to the issue raised: whether the "*jury's* award was infected by undue prejudice or bias," upholding the verdict because it did not "shock the judicial conscience." Pet. App. 35a (emphasis added).

The Court of Appeals said nothing about *BMW's* third guidepost: Petitioners never asked the court to draw a third guidepost comparison. Pet. App. 35a.

The Court of Appeals rejected Petitioners' objection to the imposition of liability for aiding and abetting a breach of fiduciary duty. The Court of Appeals found that Petitioners had "conceded" the existence of "an aiding and abetting theory of liability" by submitting jury charges on the aiding and abetting theory and by failing properly to enumerate as error on appeal the finding of liability on that ground. Pet. App. 14a, 15a. After considering the substance of Petitioners' argument, the court noted that "[w]ere we required to address this issue," the court would have affirmed. *Id.* at 14a-15a. Under state procedural rules, however, the court concluded that "we lack the jurisdiction to consider it." *Ibid.*

Following the Court of Appeals' affirmance, Petitioners filed a Motion for Reconsideration with the Court of Appeals, in which they conspicuously failed to raise any of the three questions presented in their petition. In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance. Resp. App. 21a-22a.

After the Court of Appeals rejected their Motion for Reconsideration, Petitioners sought a discretionary grant

of certiorari from the Georgia Supreme Court. In that petition, Petitioners still elected not to argue that the trial court's analysis should be reviewed *de novo* on appeal. The Georgia Supreme Court rejected the petition, declining to rule on the merits of Petitioners' claims.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present the Issue of the Appropriate Standard of State Appellate Review of a Trial Court's Due Process Determinations about a Punitive Damages Award

In *Cooper*, this Court carefully explained that it was deciding a different question from the one it resolved in *BMW*. The question in *Cooper* was directed to "the proper standard for reviewing *the District Court's* due process determination," as opposed to "the substantive standard for determining *the jury award's* conformity with due process." *Cooper*, 121 S. Ct. at 1682 n.4 (emphases added). As this Court noted, the second question (review of the jury award itself) had "already been answered" in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). 121 S. Ct. at 1682 n.4.[12] Petitioners cannot elide the distinction between these two questions. The *Cooper* question (appellate review of *the trial court's* due process determinations) was never an issue in this case before it reached this Court. Accordingly, this Court cannot properly use this

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[12] The distinction between the two questions (review of the jury verdict itself and review of the trial court's due process determinations) was further elucidated by the Court's acknowledgment that its rejection of "heightened scrutiny" in *TXO Production Corp. v. Alliance Resources Corp.* – which came in the specific context of "[t]he review of *a jury's* award," 509 U.S. 443, 456 (1993) (emphasis added) – was "irrelevant" to the question of how *the district court's* decision should be reviewed. *Cooper*, 121 S. Ct. at 1682 n.4.

case to decide whether or how to apply its *Cooper* decision to state appellate courts.

A. Petitioners did not present this question to the state court

Petitioners disingenuously claim that they argued for – and that the judgment of the Georgia Court of Appeals constitutes a rejection of – a *de novo* standard for appellate review of a state trial court's due process determination about the punitive damages award. Pet. 10. Contrary to Petitioners' cursory insinuation in violation of this Court's rules,[13] they utterly failed to present this question to the Georgia Court of Appeals. In fact, they requested the abuse of discretion standard they now challenge. Petitioners thus elected not to argue that the Due Process

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[13] Petitioners' entire claim to have presented any of their three questions to the Georgia courts rests on their citation, *without quotation* (Pet. 10), to four pages in their briefs filed in the Georgia Court of Appeals – pages not included in the appendix to their petition filed in this Court – and a parenthetical, conclusory, unsupported claim that "petitioners' briefs filed in [the Georgia Court of Appeals] clearly argued that the punitive damages award violated the due process principles recognized in *BMW*." Pet. 11 n.5. These assertions that federal claims were properly presented, without any supporting quotations, openly flout this Court's express requirement, in Rule 14.1(g)(i), that a petition include "*pertinent quotations* of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised" (emphasis added).

To remedy Petitioners' failure to satisfy Rule 14.1, and to meet their own obligation under Rule 15.2 to "point out . . . any perceived misstatement made in the petition," Respondents are supplying relevant extracts from Petitioners' briefs in the Court of Appeals in the appendix to this brief in opposition. *See* Resp. App., *infra*, at 11a-22a.

Clause requires *de novo* review even though the Eleventh Circuit had already decided, more than five months *before* Petitioners filed their brief in the Court of Appeals, to apply *de novo* review in such circumstances, *see Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999), thus creating a split with other circuits that already applied an abuse of discretion standard, *see, e.g., Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996). As a result, no state court in this case addressed or decided the "*Cooper* question." Petitioners' strategic decision now prevents this Court from considering the question in this case, either as a matter of jurisdiction or prudence in light of many " 'practical considerations' relating to this Court's capacity to decide issues." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)).

1. This Court must not review federal issues that were not presented in the state court

This Court's power to review the judgment of the Georgia Court of Appeals must derive from 28 U.S.C. § 1257, but according to the plain language of that statute, this Court has jurisdiction to review a state court's final judgment only *if* "any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). That requirement was long considered a jurisdictional one, *see, e.g., Webb v. Webb*, 451 U.S. 493, 501-02 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 392 (1836), and "the Court developed the rule that a [federal] claim would not be considered here unless it had been either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (emphasis omitted). In fact, this Court's own Rules require a petition to specify "when the federal questions

sought to be reviewed were raised . . . so as to show . . . that this Court has *jurisdiction* to review the judgment on a writ of certiorari." S. Ct. R. 14.1(g)(i) (emphasis added).

Although the Court has, in recent years, expressed uncertainty about whether the presentation requirement is actually jurisdictional, it has nevertheless consistently recognized that there is a "weighty presumption against review" of federal claims that were not presented to state courts, *Heath v. Alabama*, 474 U.S. 82, 87 (1985), and it has avoided deciding whether the requirement is still jurisdictional only by continually finding that each individual case presented no reason to depart from the rule. *See, e.g., Adams*, 520 U.S. at 90; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life*, 486 U.S. at 79; *Gates*, 462 U.S. at 222.[14]

Even if the Court were to decide that the presentation rule is not jurisdictional, using its discretion to consider Petitioners' *Cooper* issue in this case would eviscerate the "powerful policy considerations underlying" the rule. *Webb*, 451 U.S. at 499. Chief among those policies is federal-state comity, which "requires that the state courts be afforded the opportunity to perform their duty" to "construe and apply[ ] the applicable federal requirements." *Ibid.*; *see also Adams*, 520 U.S. at 90; *Bankers Life*, 486 U.S. at 79. That justification is amply buttressed by a "constellation of practical considerations." *Bankers Life*, 486 U.S. at 79. The presentation requirement "promot[es] the creation of an adequate factual and legal record"; it clarifies the issues by allowing the parties "to test and refine their positions before reaching this Court"; and it

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[14] As a leading treatise explains, were the Court finally to resolve this question, "it seems better to adhere to the traditional jurisdictional view," lest "difficult questions" about related areas be created. 16B Charles Alan Wright et al., Federal Practice and Procedure § 4022, at 322, 343 (2d ed. 1996).

allows state courts to explain the proper functioning of state rules "as a predicate to [this Court's] assessment of their constitutional adequacy." *Adams*, 520 U.S. at 90-91. This Court benefits when it has a "reasoned opinion on the merits" to review. *Bankers Life*, 486 U.S. at 80. In addition, the presentation requirement ensures that this Court does not decide federal questions unnecessarily by giving the State a chance to implement any of "a number of less intrusive, and possibly more appropriate, resolutions." *Id.* at 79-80.

This Court cannot avoid these considerations by granting certiorari, vacating the judgment, and remanding the case to the Georgia Court of Appeals for further consideration. When § 1257(a) is not satisfied, a grant of certiorari can be followed only by a *dismissal*. *See, e.g., Florida v. Thomas*, 121 S. Ct. 1905, 1910 (2001); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989). A decision to GVR this case would necessarily incorporate a *decision* that the presentation requirement is *not* jurisdictional. And even if the Court were to reach that conclusion (on an issue it has repeatedly left open over a period of eighteen years), a GVR would be inconsistent with the policies that anchor a prudential version of the presentation rule. A GVR would be as harmful to federal-state comity as actually deciding the federal questions that Petitioners raise in their petition. It would scarcely be a sign of respect to order that a state court take up anew a case that it had already resolved according to its settled procedures, so that it might address an issue that the litigants elected not to raise in an orderly and proper fashion – especially when this Court has eschewed that path in the past. In *Bankers Life*, the Court articulated the policy considerations discussed above, but it did not remand to allow the state court to consider imposing some less-intrusive resolution. *See* 486 U.S. at 80, 85 (declining to "address appellant's challenges to the size of the punitive damages award," but affirming judgment

on separate grounds). Indeed, the Court has not remanded any of the cases in which it has declined to decide whether the presentation issue is jurisdictional.[15]

Finally, even if a multitude of other reasons did not make this an inappropriate vehicle for deciding whether the standard of review prescribed in *Cooper* applies to state courts, this Court's interest in the merits of an underlying question does not warrant any departure from the established rule against review. *See Adams*, 520 U.S. at 92 n.6 ("[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect for the Court's adjudicatory process." (internal quotation marks and alterations omitted)).

2. Petitioners' *Cooper* claim was not presented to or addressed by the state court

The presentation requirement dictates that a federal issue must have been "pressed" or "passed upon" in state court. *Gates*, 462 U.S. at 219. Neither of those conditions was satisfied in this case.

There can be no doubt that the *Cooper* question was not "passed upon" by the court below. The Georgia Court of Appeals did not consider or resolve any question about what standard of review the *federal* constitution requires *state* appellate courts to apply when reviewing the determinations of trial courts about punitive damages awards. In its opinion, the Court of Appeals noted that Petitioners (as appellants in that court) "argued the punitive damages award was excessive under Georgia law." Pet. App. 35a. Citing only a state case, the Court of Appeals

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[15] *See Adams*, 520 U.S. at 92 (dismissing writ of certiorari as improvidently granted); *Yee*, 503 U.S. at 533, 539 (declining to address non-presented issue, affirming on separate grounds); *Gates*, 462 U.S. at 224, 246 (declining to address non-presented issue, reversing on separate grounds).

explained that "[a]n award of punitive damages will not be disturbed on appeal unless it is so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." *Ibid.* (internal quotation marks omitted). There was no other reference to the standard of review for punitive damages in the court's opinion. The rest of the paragraph, however, made clear that the Court of Appeals was not addressing the *Cooper* question. Rather than scrutinize the trial court's determinations, it expressly evaluated "whether *the jury's award* was infected by undue prejudice or bias," and concluded that the jury's award was not excessive. *Ibid.* (emphasis added). Because the Court of Appeals gave no indication that it considered its standard of review of the trial court's determinations about punitive damages to be dictated by federal constitutional concerns, it cannot be found to have "passed upon" the issue. *Cf. Webb*, 451 U.S. at 495 ("[N]owhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon.").

"This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Ibid.* (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). Petitioners cannot meet that burden here for the simple reason that they did not present the *Cooper* question in the state court. Indeed, their briefs filed in the Court of Appeals give no hint that the appellate standard for reviewing the trial court's due process determinations in punitive damage cases is a federal constitutional concern. Instead, in their opening brief to the Court of Appeals, Petitioners alleged that "[t]he trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive" (Resp. App. 15a), but, under the heading "Standard of Review," Petitioners then told the appellate

court: "This Court reviews for *abuse of discretion* rulings . . . for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995)." Resp. App. 16a (emphasis added).[16] Petitioners did not further discuss the standard of review in their briefs to the Court of Appeals.

Petitioners vainly attempt to shoehorn the discrete *Cooper* question into their general reference to "due process principles recognized in *BMW*." Pet. 11 n.5. It is, however, well established that a petitioner must have raised "the claim of invalidity *and the ground therefor . . . with fair precision* and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (emphasis added). "A general statement that the decision of a court is against the constitutional rights of the objecting party

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[16] Petitioners' citation of *Lisle*, a state-law case, for the standard of review could scarcely indicate that they considered the proper standard for reviewing a trial court's punitive-damages rulings to be a matter of *federal* constitutional concern.

In their reply brief in support of their Application for Stay in this Court, Petitioners claimed that they cited *Lisle* only with respect to the denial of their motion for a new trial. *See* Applicants' Reply to Respondents' Response to Application for Stay at 5 n.5, No. A-725 (filed Feb. 28, 2001) (hereinafter "Stay Reply"). But that motion is precisely how Petitioners raised their punitive damages challenge. They cited *Lisle* to the trial court for the proposition that it "must *set aside or reduce* the [punitive damages] award." Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial at 76 (filed Feb. 1, 1999). This was in fact the required procedure under O.C.G.A. § 51-12-12(b) (Resp. App. 9a), which provides that the remedy for an excessive verdict must be either a new trial, a new trial on damages, or a conditional new trial if the plaintiff refuses a remittitur. *See Spence v. Hilliard*, 389 S.E.2d 753, 754 (Ga. 1990) ("Under the plain language of the statute a judge has three alternatives when a jury makes an award of damages that is clearly inadequate or excessive.").

or against the Fourteenth Amendment, or that it is without due process of law, . . . will not raise a Federal question. . . . " *Clarke v. McDade*, 165 U.S. 168, 172 (1897); *see also Beck v. Washington*, 369 U.S. 541, 553 (1962) (single sentence in 125-page state-court brief did not preserve question for this Court's review).

Petitioners' citation of *BMW*, without referring to the standard of appellate review (*see* Resp. App. 17a), did not remotely present the *Cooper* question. *See Adams*, 520 U.S. at 88 (citation to case that "is relevant to the federal claim" is inadequate if case is "mentioned . . . in the context of an entirely different argument"). That is particularly true when this Court has explicitly acknowledged that *Cooper* resolved a separate question from the one addressed in *BMW*. *See* 121 S. Ct. at 1682 n.4. Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones; this Court will not review "any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different *or the same clause* in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 317 (1937) (emphasis added). Any other conclusion would impose on state courts the obligation to embark, at the slightest suggestion of some limited impropriety, upon *sua sponte* missions to search out, analyze, and dispose of every variant of a potential federal argument without guidance from the parties. To impose such a duty would eviscerate the "important interest of comity" that underlies the presentation requirement. *Adams*, 520 U.S. at 90.

In their reply brief filed in support of their Application for Stay in this Court, Petitioners attempted to avoid the necessary consequences of their plain failure to raise the *Cooper* question in the Court of Appeals by claiming that they raised it at the "earliest next opportunity." Stay Reply at 5. But they did not, in fact, refer to standards of

appellate review in the Motion for Reconsideration they filed with the Court of Appeals. *See* Resp. App. 21a-22a. Even when they subsequently filed their certiorari petition with the Georgia Supreme Court, they did not say anything about whether the trial court's determination about punitive damages should be reviewed *de novo*; nor did they suggest to the Georgia Supreme Court that this was a federal or constitutional issue.[17]

Nevertheless, whatever Petitioners said *after* they lost in the Court of Appeals came too late to matter for presentation purposes. *See Yee*, 503 U.S. at 533 (federal claim was not properly raised when mentioned for the first time in petition for discretionary review by state supreme court); *see also Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (referring to "[t]he long-established general rule . . . that the attempt to raise a federal question after judgment, on a petition for rehearing, comes too late").

In their reply brief filed in support of their Application for Stay in this Court, Petitioners also attempted to analogize their presentation of the standard-of-review question to the presentation made by the petitioner in *Cooper*. *See* Stay Reply at 5. Such a comparison is, of course, fundamentally flawed, because *Cooper* involved an appeal from a federal court. Presentation concerns are much more significant when the lower court is a state court. *See United States v. Williams*, 504 U.S. 36, 44 n.5 (1992); *id.* at 59 n.6 (dissenting opinion of Stevens, J., joined by Blackmun and O'Connor, JJ.). Moreover, the petitioner in *Cooper*, unlike Petitioners here, actually requested that the Court of Appeals apply a *de novo*

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[17] In their opposition to Petitioners' stay application in this Court, Respondents mistakenly said Petitioners had raised the *Cooper* question in their certiorari petition filed in the Georgia Supreme Court. In fact, even at that point, they raised only a *BMW* question of how jury awards themselves should be reviewed. *See supra* pp. 10-11 & n.12; *Cooper*, 121 S. Ct. at 1682 n.4.

standard of review. *See* Pet.'s Reply to Brief in Opp., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035 at 1 (filed Aug. 17, 2000).

Petitioners' invocation of this Court's recent order in *San Paolo U.S. Holding Co. v. Simon*, 121 S. Ct. 2190 (2001) (mem.), overlooks the presentation issue altogether. Although the Court GVRd that case in light of *Cooper*, the petitioner in *San Paolo* did precisely the opposite of what Petitioners here did: The *San Paolo* petitioner clearly requested *de novo* review in the state court. *See* Resp. App. 24a (state court of appeal brief arguing that "the determination of the constitutionality of a punitive damage award under the due process clause is reviewed on a *de novo* basis").[18] Accordingly, there was no jurisdictional bar to a GVR in *San Paolo*, and the procedure followed there is inapposite to this case.

It is simply too late for Petitioners to inject a *Cooper* question into this case.

B. Petitioners waived this claim by failing to appeal directly to the Georgia Supreme Court

Petitioners' *Cooper* claim is independently barred by an element of judicial procedure imposed by the Georgia Constitution. Georgia has a bifurcated appeals process that requires an appellant to choose whether to appeal to the Georgia Supreme Court or the Georgia Court of Appeals. The jurisdiction of the two courts is mutually

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[18] Petitioners refer to the "substantial evidence" standard applied by the state court in *San Paolo*. Pet. 24 n.19. In fact, unlike Petitioners here, the petitioner in *San Paolo* clearly distinguished for the state court between (1) the *de novo* standard that should apply to "the determination of the constitutionality of a punitive damage award" and (2) the "substantial evidence" standard that should apply to the general question of excessiveness, which it described as its challenge to "the amount of punitive damages awarded." Resp. App. 24a.

exclusive. The Georgia Supreme Court has "exclusive appellate jurisdiction in . . . [a]ll cases involving the construction of . . . the Constitution . . . of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question." GA. CONST. art. VI, § 6, ¶ 2(1) (Resp. App. 2a-3a). The Court of Appeals, on the other hand, "shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law." *Id.* art. VI, § 5, ¶ 3 (Resp. App. 2a).

By statute and precedent it is clear under Georgia law that a verdict's excessiveness is a question of fact that is reviewed *only* for an abuse of discretion. *See* O.C.G.A. § 51-12-12(a) (Resp. App. 9a); *see also Seaboard Coast Line R.R. v. Towns*, 274 S.E.2d 74, 77-78 (Ga. App. 1980) (applying same statute in prior codification; "An excessive or inadequate verdict constitutes a mistake of fact rather than of law. . . . [T]his court's jurisdiction is confined to the question of whether the trial court abused [her] discretion in overruling the motion for a new trial on this ground." (internal quotation marks omitted)); *Atlanta Transit Sys., Inc. v. Robinson*, 213 S.E.2d 547, 549 (Ga. App. 1975) (same).[19] Any constitutional challenge to that standard of review needed to be directed to the Georgia Supreme Court.[20]

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[19] This is the same statute Petitioners cited in asking the Court of Appeals to set aside or reduce the punitive damages. *See* Resp. App. 16a, 21a-22a.

[20] In their reply brief filed in support of their Application for Stay in this Court (Stay Reply at 4), Petitioners invoked *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. App. 1994). Although *Moseley* establishes that the Court of Appeals may apply settled constitutional principles to factual circumstances, that conclusion is irrelevant to the circumstances of this case, where Petitioners' *Cooper* question would require a determination that the U.S. Constitution

Petitioners, however, elected to appeal to the Court of Appeals, and certified that "the constitutionality of a law . . . has not been drawn into question." Resp. App. 13a. Therefore, Petitioners affirmatively represented to the Georgia Court of Appeals that this case did not involve a constitutional challenge to Georgia's established procedure and statute for reviewing the excessiveness of punitive damage awards under an abuse of discretion standard.

This Court has previously held that precisely such a process in Illinois state courts resulted in a binding waiver that deprived this Court of jurisdiction to address federal constitutional issues. *See Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 196 (1925) (State law "required the appeal on constitutional grounds to be taken directly . . . to the Supreme Court of Illinois. [Petitioner] elected, instead, to go to the Appellate Court . . . , and thereby it waived the question which it now wishes to present here.").

Under these circumstances, even a GVR would pose a particularly strong threat to comity and rational judicial process. By remanding to the Georgia Court of Appeals, this Court would be ordering that court to consider whether to declare Georgia's established procedure unconstitutional, an issue which, under state law, it has no power to decide.

C. Petitioners requested the standard of review they now challenge

Petitioners' own brief requested that "excessive damages" be reviewed for "abuse of discretion." Resp. App. 16a. Petitioners never said that excessiveness is a question of law (which would have been inaccurate under

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invalidated Georgia's well-established statute and caselaw mandating abuse-of-discretion review.

established Georgia law, *see supra* pp. 21-22) or that any excessiveness question should be reviewed *de novo* on appeal. Moreover, they cited cases such as *Lisle* and *Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470 (Ga. App. 1984), which established that the trial court's decision on the question of excessiveness was appropriately reviewed for an abuse of discretion. *See* Resp. App. 16a; *see also supra* p. 17 n.16 (discussing *Lisle*); *Stubblefield*, 319 S.E.2d at 481.

Taken alone, Petitioners' request for an abuse of discretion standard constitutes an independent ground for this Court to deny certiorari. *See, e.g., International Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (statement of Justice O'Connor respecting denial of petition for a writ of certiorari) (certiorari is properly denied where petitioner took inconsistent position below).[21]

II. The State Court of Appeals Did Not Improperly Disregard the Third *BMW* Guidepost

Attempting to shift attention from the incurable presentation problems besetting their *Cooper* question, Petitioners now relegate it to the end of their petition and elevate to Question 1 an old chestnut: whether courts can disregard *BMW*'s third guidepost, which refers to "the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Petitioners explain that several courts have found a comparison between a punitive damages award and other penalties to be irrelevant or inapplicable when there is no directly analogous civil or criminal penalty. The state

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[21] In addition, Petitioners' request for abuse of discretion review barred them under Georgia law from later claiming that use of that standard was error. "[O]ne cannot complain of an appellate ruling, order, or judgment that his own legal strategy, appellate procedure or conduct aided in causing." *Williams v. Food Lion, Inc.*, 446 S.E.2d 221, 225 (Ga. App. 1994).

court in this case, however, made no such finding, because it was never even asked to address this question.

The trends in state court application of the third guidepost that Petitioners articulate are not new. *See* Pet. 14 n.7. This Court has frequently denied certiorari in cases raising this precise issue, and it has even done so in cases in which lower courts have affirmatively decided not to apply the third guidepost.[22] Taken alone, those factors strongly indicate that this issue may not be cert-worthy at all. In this case, however, it is even less cert-worthy, because the Court of Appeals has not even taken a side in whatever conflict there may be. Furthermore, certiorari is made even less appropriate by the specific facts of this case, which demonstrate that the award was not excessive under *BMW*.

A. The applicability of the third guidepost was not presented to or addressed by the state court

Petitioners' general references to due process (*see supra* pp. 7-10) were inadequate to raise a "third guidepost" issue, *see Clarke v. McDade*, 165 U.S. at 172, and their naked references to *BMW* were certainly not sufficient to raise a legal claim about a topic on which they now contend there are two established lines of authority. *See Adams*, 520 U.S. at 88.

Nor was this issue addressed by the state court. There was no mention whatsoever of the third guidepost in the Court of Appeals opinion. It is therefore clear that the Court of Appeals did not "squarely consider[ ] and

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[22] In a case cited by Petitioners, for example, the petition presented the third-guidepost question, describing both "a trend in some jurisdictions to evade this *BMW* guidepost" and the existence of "directly conflicting decisions over application of this guidepost" (Pet. for Cert., *Ford Motor Co. v. Ammerman*, No. 99-1221 at i, 21, 22 (filed Jan. 19, 2000)), but this Court denied certiorari, *see* 529 U.S. 1021 (2000).

resolve[ ]" whether *BMW*'s third guidepost applies in cases like this, and review by this Court of that issue is accordingly inappropriate. *Gates*, 462 U.S. at 218 n.1.

B. The punitive damages award was not excessive under *BMW*

Even if jurisdiction existed over this question, the merits of this case present only a fact-bound application of settled law that would be of no interest to this Court in the exercise of its discretionary jurisdiction. Moreover, that application of settled law shows that the punitive damages award is not excessive under *BMW*.

Under the first *BMW* guidepost, Petitioners' conduct was highly reprehensible, involving a long-term scheme characterized by "wilful misconduct" in clear violation of their fiduciary obligations. Pet. App. 34a. Not surprisingly, courts around the country have repeatedly found that breaches of fiduciary duty between partners can warrant punitive damages.[23]

Under the second *BMW* guidepost, the ratio of punitive to compensatory damages in this case is only 1.3 to 1. There is no "simple mathematical formula" to mark excessiveness, *BMW*, 517 U.S. at 582, but even Petitioners recognize that this ratio provides no ground for attack.

Under the third *BMW* guidepost, Petitioners' only attempt, even in this Court, to analyze comparable penalties is to compare the award to federal criminal antitrust fines levied in FY 1997. *See* Pet. 15. Petitioners presumably believe that antitrust law penalizes "comparable misconduct" because it deals with financial injuries inflicted by businesses. But the statutory availability of *treble damages* for federal antitrust violations (*see* 15 U.S.C. § 15(a))

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[23] *See, e.g., Clark v. Lubritz*, 944 P.2d 861, 866-67 (Nev. 1997) (citing cases). Punitive damages have long been available in Georgia for the tort of breaching a fiduciary duty. *See, e.g., Pelletier v. Schultz*, 276 S.E.2d 118, 120 (Ga. App. 1981).

demonstrates the reasonableness of the total award in this case, which is significantly lower than treble damages would have been. Moreover, Petitioners' antitrust statistic is meaningless. It excludes all *civil* antitrust liability, even though "[t]he heart of antitrust continues to be private litigation,"[24] and civil antitrust liability dwarfs criminal liability.

Apart from Petitioners' antitrust example, there are other penalties for comparable misconduct that demonstrate the reasonableness of this punitive damages award. The Court of Appeals found that Petitioners "took money belonging to [Respondents]." Pet. App. 34a. This is plainly comparable to theft.[25] In Georgia, "[t]heft by taking in breach of a fiduciary obligation is a felony offense." *Hanson v. Georgia*, 501 S.E.2d 865, 868 (Ga. 1998); *see* O.C.G.A. § 16-8-2, -3 (Resp. App. 3a-4a). As such, it is a serious crime, punishable by a 15-year prison term. *See* O.C.G.A. § 16-8-12(a)(2) (Resp. App. 4a-5a). In addition, if the prison term is suspended or probated, a criminal defendant can be ordered to make restitution to the victim up to the amount that would be recoverable as damages in a civil action. *See* O.C.G.A. § 17-14-3, -9 (Resp. App. 8a-9a).

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[24] *See* Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 154-55 (1997).

[25] Indeed, Respondents sued Petitioners for both conversion and breach of fiduciary duty to recover the monies taken in breach of trust. In closing argument, however, Respondents' counsel expressly asked the jury to choose only one basis for liability so as to avoid a double recovery. *See* Tr. Transcript (12/17/98) at 187-88 ("You can return a verdict based on breach of fiduciary duty *or* conversion. It's both. . . . but *don't return the verdict twice.*" (emphases added)). The jury accordingly awarded the taken monies under the breach of fiduciary duty claim and found for Petitioners on conversion. Pet. App. 2a & n.2, 33a, 34a.

Moreover, Petitioners committed more than two acts of theft against both Flags and Fund, meaning that their conduct could fall under Georgia's RICO statute. *See* O.C.G.A. §§ 16-14-1 *et seq.* Accordingly, such conduct could trigger a prison term of up to 20 years and/or a fine as large as *three times* their pecuniary gain. *See* O.C.G.A. § 16-14-5 (Resp. App. 7a). The civil penalty for a RICO violation includes treble damages, to which punitive damages can also be added. *See* O.C.G.A. § 16-14-6(c) (Resp. App. 8a).

III. Petitioners Failed to Present Any Notice-Based Due Process Challenge to Punitive Damages for Aiding and Abetting Breaches of Fiduciary Duty, Waived Any Challenge to Liability on That Basis, and Had Full Notice That Such Conduct Was Illegal

A. Petitioners' notice concerns were not presented to or addressed by the state court and are independently barred by waiver

As set forth fully above (*see supra* pp. 7-10), Petitioners made only the briefest mention of due process in their briefs in the Court of Appeals, and their argument and their citation to *BMW* were limited exclusively to the point that this case involves economic damages rather than threats to health and safety. Resp. App. 17a, 19a. This was clearly inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice. *See supra* pp. 17-19. That insufficiency alone should preclude this Court from granting certiorari, either as a matter of jurisdiction or of prudential regard for the policies underlying the presentation doctrine.

In addition, Petitioners' notice claim is independently barred by their waiver at trial of any objection to aiding-and-abetting liability. As the Court of Appeals

concluded, Petitioners waived this issue under state procedural requirements in two separate ways: by failing to object at trial to aiding-and-abetting liability (and in fact submitting their own charges on that theory), and by failing to "enumerate[ ] as error the jury's finding of liability on this theory." Pet. App. 14a, 15a. Thus, under established state procedural law, the Court of Appeals *had no jurisdiction* to consider Petitioners' belated objections to aiding-and-abetting liability. *Ibid.* This constitutes an adequate and independent state law ground that prevents this Court from considering any federal law questions attendant to aiding-and-abetting liability. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

B. Petitioners had full notice of their potential liability for aiding and abetting

Petitioners' claim that they lacked notice of their potential liability cannot be taken seriously. It is difficult to fathom how Petitioners can claim to have been surprised when held liable based on a legal theory for which they, themselves, submitted a jury charge. Pet. App. 14a, 15a.

Petitioners' lack of notice argument rests on their interpretation of the partnership agreement and on their contention that there can be no liability for aiding and abetting a breach of fiduciary duty. Pet. 17. The Court of Appeals, however, rejected both of those predicates as a matter of state law.

As to the partnership agreement, the Court of Appeals found as a matter of law that Petitioners had a duty to act "in good faith as to the amount and type of capital improvements." Pet. App. 16a. Even more compellingly, it found *as a matter of fact* that Petitioners themselves had "never interpreted the capital expenditures provision" to mean what they now claim it meant. *Id.* at 19a.

In dicta, the Court of Appeals rejected the linchpin of Petitioners' notice claim – that aiding-and-abetting liability was a "novel tort." The court noted that such claims had "at least twice" been acknowledged as viable in prior Georgia cases and that such liability was "implicit in OCGA § 51-12-30 [Resp. App. 9a-10a], pertaining to the joint liability of one who procures an actionable wrong." Pet. App. 13a-14a.[26] Moreover, such liability has long been clear under the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused.").

Petitioners try to concoct a conflict by relying on *Banks v. ICI Americas, Inc.*, 469 S.E.2d 171 (Ga. 1996), in which the Georgia Supreme Court held that the federal Constitution does not prevent the imposition of punitive damages for the violation of a "new" *product-liability* rule. *See* Pet. 20. *Banks* is, however, utterly unrelated to this case and the judgment Petitioners seek to have reviewed. Neither the parties nor the Court of Appeals cited *Banks* for anything. Thus, Petitioners essentially ask this Court to intervene so that it could reject *Banks* on the ground that, *if* the state court had not held as a matter of state law that Petitioners waived their challenge to aiding-and-abetting liability (Pet. App. 14a), and *if* the state court had not noted in the alternative that such liability existed under pre-existing Georgia law and that the evidence supported a finding of aiding-and-abetting liability (*id.* at 14a, 15a), then the state court *might have* proceeded to rely

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[26] In addition to the cases cited by the Court of Appeals, see also *Loyola Federal Savings Bank v. Fickling*, 58 F.3d 603, 605, 608 (11th Cir. 1995) (upholding $215,000 jury verdict on claim against bank under Georgia law for "assist[ing]" a "general partner in a breach of a fiduciary duty owed to" a limited partner).

on *Banks* in this case to reject Petitioners' due process claim (had they actually articulated that claim). This Court does not employ its certiorari jurisdiction to pursue such will-o'-the-wisps.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. BUTLER, JR.
GEORGE W. FRYHOFER III
BUTLER, WOOTEN, SCHERFFIUS, FRYHOFER, DAUGHTERY & SULLIVAN
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

GERALD DAVIDSON, JR.
ANDERSEN, DAVIDSON & TATE
P.O. Box 2000
Lawrenceville, Georgia 30246
(770) 822-0900

EMMET J. BONDURANT II
Counsel of Record
H. LAMAR MIXSON
MICHAEL B. TERRY
JOSHUA F. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree St., NW
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Respondents

August 14, 2001

RESPONDENTS' APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE
Title 28 – Judiciary and Judicial Procedure
Part IV – Jurisdiction and Venue
Chapter 81 – Supreme Court

* * *

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTION OF THE STATE OF GEORGIA
Article VI – Judicial Branch

* * *

Section 5 – Court of Appeals

* * *

Paragraph 3. Jurisdiction of Court of Appeals; decisions binding.

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

* * *

Section 6 – Supreme Court

* * *

Paragraph 2. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance,

or constitutional provision has been drawn in question;

* * *

OFFICIAL CODE OF GEORGIA

* * *

§ 16-8-2. Theft by taking

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

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§ 16-8-3. Theft by deception

(a) A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(2) Fails to correct a false impression of an existing fact or past event which he has previously created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record; or

(5) Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction under this subsection.

(c) "Deceitful means" and "artful practice" do not, however, include falsity as to matters having no pecuniary significance, or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

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§ 16-8-12. Penalties for violation of Code Sections 16-8-2 through 16-8-9 [involving theft]

(a) A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

* * *

(2) If the property was taken by a fiduciary in breach of a fiduciary obligation . . . , by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

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§ 16-14-3. Definitions

As used in this chapter, the term:

* * *

(6) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

* * *

(8) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after July 1, 1980, and that the last of such incidents occurred within four years, excluding any

periods of imprisonment, after the commission of a prior incident of racketeering activity.

(9)(A) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state:

* * *

(ix) Article 1 of Chapter 8 of this title, relating to theft;

* * *

(B) "Racketeering activity" shall also mean any act or threat involving . . . theft . . . which is chargeable under the laws of the United States or any of the several states and which is punishable by imprisonment for more than one year.

* * *

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§ 16-14-4. Prohibited activities

(a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

* * *

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§ 16-14-5. Criminal penalties for violation of Code Section 16-14-4

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

* * *

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

* * *

---

§ 16-14-6. Available civil remedies

* * *

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

* * *

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§ 17-14-3. Requirement of restitution by adult offender as condition of relief generally

The judge of any court of competent jurisdiction may order that an adult offender make restitution as a condition of any relief ordered by the court. The board may order that an adult offender make restitution as a condition of any relief ordered by the board. The department may order that an adult offender make restitution as a condition of any relief ordered by the department.

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§ 17-14-9. Amount of restitution

The amount of restitution ordered may be equal to or less than, but not more than, the victim's damages.

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§ 51-12-12. Court interference with jury verdict as to damages

(a) The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case.

(b) If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

* * *

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§ 51-12-30. Procurer of wrong as joint wrongdoer; how action brought against joint wrongdoer

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and

may be subject to an action either alone or jointly with the person who actually committed the injury.

APPENDIX B

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' ENUMERATION OF ERRORS

[September 20, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags
Over Georgia, Inc.

* * *

[Page 2]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

[Page 3]

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

Statement of Jurisdiction

This Court has appellate jurisdiction over this appeal under Article VI, Section 5, Paragraph 3 of the Georgia Constitution because this is not a case reserved to the Supreme Court or conferred on another court by law. This case is not reserved to the Supreme Court under Article VI, Section 6, Paragraph 3 of the Georgia Constitution.

This appeal is not within the exclusive appellate jurisdiction of the Supreme Court under Article VI, Section 6, Paragraph 2 of the Georgia Constitution because it does not involve construction of a doubtful constitutional provision or construction of a treaty, and

the constitutionality of a law, ordinance or constitutional provision has not been drawn into question.

* * *

APPENDIX C

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

[September 20, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags
Over Georgia, Inc.

* * *

[Page 15, Summary of Argument]

Seventh, the court erred by not setting aside the $257,000,000 punitive damages award. The evidence here, involving a purely commercial dispute, fell far short of that required to impose such damages. (*See* enumeration of error 12.) Moreover, all punitive damages above $250,000 must be remitted because the court failed to instruct the jury on the clear-and-convincing burden of proof on the special finding of specific intent to harm. (*See* enumeration of error 13.) And lastly, the unprecedented amount awarded is excessive under both statutory and constitutional standards. (*See* enumeration of error 14.)

* * *

[Page 17, Enumeration of Errors]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

PART THREE

Standard of Review

This Court reviews *de novo* rulings on questions of law. *Bumgarner v. Green*, 177 Ga. App. 156, 158-60, 489 S.E.2d 43, 46-47 (1997). Improper jury charges and comments on witness credibility require a new trial if harmful. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 297-98, 116 S.E.2d 288, 293 (1960); *Speagle v. Nationwide Mut. Fire Ins. Co.*, 138 Ga. App. 384, 385, 226 S.E.2d 459, 460 (1976). Denial of directed verdict and JNOV motions must be reversed if the evidence does not support the verdict. *Tate v. Holloway*, 231 Ga. App. 831, 833, 499 S.E.2d 72, 74 (1998). This Court reviews for abuse of discretion rulings to admit or exclude evidence, *Andrews v. Wilbanks*, 265 Ga. 555, 556, 458 S.E.2d 817, 818 (1995), on discovery sanctions, *Harwood v. Great Am. Management & Inv., Inc.*, 171 Ga. App. 488, 491, 320 S.E.2d 269, 272 (1984), and for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995).

* * *

[Page 59, Argument and Citation of Authorities]

C. The Punitive Damages Are Excessive.

Finally, the $257 million punitive damages award is excessive and must be set aside or reduced. *See* O.C.G.A. § 51-12-12(a). This award is over *30* times larger than the largest punitive damages award ever paid in this state – the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system.

Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Here, the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished. This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988),

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there is no "sensible relation between punishment and offense". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

* * *

APPENDIX D

IN THE COURT OF APPEAL [*sic*]

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

REPLY BRIEF OF APPELLANTS

[October 22, 1999]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment
Company, L.P., Six Flags
Entertainment Corporation,
Six Flags Theme Parks Inc., and
Six Flags Over Georgia, Inc.

* * *

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C. The Punitive Damages Are Excessive.

Plaintiffs incorrectly assert that the ratio of compensatory to punitive damages "insulates" the punitive damages award. The actual ratio is much higher than Plaintiffs claim because the compensatory damages award is itself grossly excessive. (Dft. Br. at 51-57) In any event, this ratio is *not* the legal standard for the validity of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614, 409 S.E.2d 501, 502-03 (1991).

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This is not a case involving the risk of personal injury or death, or any widespread harm. It is a business dispute between two highly sophisticated parties involving a complex tax shelter. In this context, over a quarter of a *billion* dollars in punitives is excessive regardless of the "ratio" to compensatory damages. *See Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 122-23, 365 S.E.2d 827, 833 (1988).

Finally, the goal of deterrence does not justify the punitive damages award because "less drastic remedies could be expected to achieve that goal". *BMW*, 517 U.S. at 584.

* * *

APPENDIX E

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' MOTION FOR RECONSIDERATION

[July 21, 2000]

Walt M. Britt
Georgia Bar No. 083237
Chandler & Britt, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

Evan R. Chesler
Keith R. Hummel
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellants
Time Warner Entertainment Company, L.P.,
Six Flags Entertainment Corporation, Six Flags
Theme Parks Inc., and Six Flags Over Georgia, Inc.

* * *

[page 15]

XI. THE COURT SHOULD RECONSIDER ITS DECISION WITH RESPECT TO ENUMERATION OF ERROR NUMBERS TWELVE, THIRTEEN AND FOURTEEN.

The Court appears not to have considered controlling legal precedent cited by Defendants on pages 57-60 of their opening brief and 28-30 of their reply brief that mandate that the punitive damage award be stricken, or at least vastly reduced. In particular, we note the rule that, absent "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"), punitive damages are not authorized. Further, the Court has overlooked the dictates of O.C.G.A. § 51-12-5.1, which requires that "specific intent to cause harm" had to be proved by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b). The trial court's failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *See Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979). Finally, the Court has not, as is required by

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O.C.G.A. § 51-12-12(a), set aside the award as violating the Excessive Fines Clause of the Georgia Constitution because there is no "sensible relation between punishment and offense", *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 119-22, 365 S.E.2d 827, 831-33 (1988), and the Due Process Clauses of the Georgia and United States Constitutions, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

* * *

APPENDIX F

2ND CIVIL NO.
B121917

In the Court of Appeal
OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Plaintiff and Respondent,

VS.

SAN PAOLO U.S. HOLDING COMPANY, INC.
Defendant and Appellant.

Appeal From
Superior Court of Los Angeles County
Honorable Richard P. Kalustian
BC152431

APPELLANT'S OPENING BRIEF

[November 17, 1998]

STEVEN N. RICHMAN
State Bar No. 101267
BETH ANN R. YOUNG
State Bar No. 143945
LAWRENCE A. ABELSON
State Bar No. 162407
EPPORT & RICHMAN, LLP
Attorneys at Law
10100 Santa Monica Boulevard
Suite 1450
Los Angeles, CA 90067-4118
(310) 785-0885

Attorneys for Defendant and Appellant San Paolo U.S. Holding Company, Inc.

* * *

[page 14, Standard of Review]

Third, as to the amount of the punitive damages awarded to SIMON, the standard of review is to determine if "the entire record viewed most favorably to the judgment indicates the award was rendered as the result of passion and prejudice." (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 388, 202 Cal.Rptr. 204; internal citation omitted; *see also Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927, 148 Cal.Rptr. 389.) The passion and prejudice inquiry is a species of the substantial evidence standard of review. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259, 259 Cal.Rptr. 311.)

Fourth, the determination of the constitutionality of a punitive damage award under the due process clause is reviewed on a *de novo* basis. (*See State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67, 60 Cal.Rptr.2d 342, 344.)

* * *

Supreme Court, U.S.
FILED
AUG 28 2001
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(3)

No. 00-1875

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

REPLY BRIEF FOR PETITIONERS

EVAN R. CHESLER
KEITH R. HUMMEL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

HENK BRANDS
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

DAVID M. HEILBRON
FRANK M. HINMAN
JASON M. COHEN
MCCUTCHEN, DOYLE, BROWN & ENERSON
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

Counsel for Petitioners

August 28, 2001

(Additional Counsel Listed on Inside Cover)

15 pp

WALT M. BRITT
CHANDLER & BRITT, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

HAROLD G. CLARKE
NORMAN L. UNDERWOOD
JOHN J. DALTON
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

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CONSTITUTION

U.S. Const. Amend. XIV (Due Process Clause) . 5

IN THE
Supreme Court of the United States

No. 00-1875

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

REPLY BRIEF FOR PETITIONERS

The Petition showed that, in this case involving punitive damages of more than a quarter billion dollars (almost $340 million with interest by now), two questions independently merit plenary review and, at a minimum, one question requires a GVR in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). Respondents do not seriously quarrel with the merits of petitioners' arguments. Instead, they stand on a single procedural objection: that petitioners did not adequately preserve their arguments below. Respondents advanced that same objection — using the same overheated rhetoric — when they unsuccessfully opposed petitioners' request for a stay. It was rejected then, and it should be rejected now.

1. The Petition demonstrated that, as so many other state appellate courts have done, the Georgia Court of Appeals in this case simply ignored *BMW*'s third guidepost, which requires a comparison to "the civil or criminal penalties that

could be imposed for comparable misconduct." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996). Thus, the Petition showed, this case provides an opportunity to halt a widespread and disturbing trend in state courts to ignore a crucial component of the *BMW* inquiry. *See* Pet. 12-15. Respondents now present three meritless objections.

First, respondents claim that petitioners failed adequately to preserve their claim. *See* Br. in Opp. 24-25. This is so, they suggest, because petitioners "included only two sentences alleging any due process violations," *id.* at 7, and cited *BMW* without making specific reference to the third guidepost, *id.* at 24. But respondents cannot, and do not, deny that petitioners expressly asked the Court of Appeals to review the trial court's *BMW* determination. *See* Br. in Opp. App. 17a, 19a. Because the third guidepost is an inherent part of *BMW* review, that alone would have been enough.[1] And, even though exacting page limitations forced petitioners to compress their discussion of the numerous issues arising from a six-week trial, their opening and reply briefs each devoted multiple pages to *BMW*-related punitive damages issues.[2] Among other things, petitioners pointed out that there is more

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[1] *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'").

[2] Respondents reduce this to "two sentences" (Br. in Opp. 7) by crediting only sentences accompanied by express citation of federal authority. Because state-law limitations run parallel to the *BMW* restrictions, that is wrong. Indeed, respondents apply a double standard: in describing the opinion below, they apparently count as *BMW* discussion all passages addressing punitive damages issues (state law or otherwise) as well as any discussion of facts that (in their view) supported the imposition of punitive damages. *See id.* at 8 ("Nearly half of the court's opinion set forth and explained the predicates for the first *BMW* guidepost — the reprehensibility of Petitioners' conduct.").

to *BMW* review than the second ("ratio") guidepost,[3] and expressly challenged the award as disproportionate compared to penalties imposed elsewhere.[4]

Second, respondents offer that the third-guidepost issue "may not be certworthy." Br. in Opp. 24. This is so, they suggest, because the issue has been raised previously in a petition (filed by another party) that this Court denied. *See id.* at 24 n.22.[5] But a denial of certiorari does not "have any precedential effect," *Hopfman v. Connolly*, 471 U.S. 459, 461 (1985) (*per curiam*), and, if anything, the previous filing shows that the issue is recurrent. Moreover, respondents nowhere deny the issue's broad significance. Nor could they: juries' continued tendency to impose outsized punitive damages awards has a profoundly debilitating effect on the administration of civil justice in this Nation. As this case illustrates, *BMW*'s first two guideposts are insufficient to halt this tendency; only meaningful enforcement of the third guidepost can provide an absolute and objective anchor to reality. *See Cooper*, 121 S. Ct. at 1689.

Finally, respondents argue that, because petitioners' conduct amounted to "theft" punishable by imprisonment, the third guidepost has no restraining force in this case. *See* Br.

---

[3] Br. in Opp. App. 19a ("[A] quarter of a *billion* dollars in punitives is excessive regardless of the 'ratio' to compensatory damages.").

[4] *Compare* Br. in Opp. App. 16a ("This award is over *30* times larger than the largest punitive damages award ever paid in this state — the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system.") *with BMW*, 517 U.S. at 575 (third guidepost involves comparison to "the civil penalties authorized or imposed in comparable cases").

[5] Respondents also point out that the Court denied certiorari in three other cases cited in the Petition. *See* Br. in Opp. 24 & n.22. But, in those cases, the petitions did not present the question presented here.

in Opp. 25-27. That, frankly, is absurd; the instances of "theft" to which respondents point involved complex accounting disputes concerning the realization of income. If the third guidepost were so malleable as to allow petitioners' conduct to be analogized to theft, it would be devoid of any practical effect. Besides, the jury verdict in this case precludes respondents' theft analogy: although the complaint included a count for conversion, the jury found against respondents on that count. *See* Pet. App. 2a n.2.[6]

2. "Elementary notions of fairness enshrined in [this Court's] constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Petitioners did not receive such notice. In light of the text and purpose of the partnership agreement, petitioners' executives acted reasonably in believing that their conduct, far from being unlawful, was expressly permitted. *See* Pet. 17. Moreover, because the Georgia courts had never before recognized a cause of action for aiding and abetting the breach of a fiduciary duty, the corporate-parent petitioners — against whom the overwhelming share of punitive damages was awarded even though they owed respondents no fiduciary duty — had no reason to expect that they might be held liable. *See* Pet. 17-18. The approach of the Georgia courts — permitting the imposition of punitive damages where a defendant's conduct does not violate clearly established legal duties —

---

[6] Respondents try to soften the impact of this fact by implying that, despite evidence that would have supported a conversion verdict, they *asked* the jury to find against them on that count. *See* Br. in Opp. 26 n.25. In fact, respondents submitted merely that, while the jury could hold petitioners liable on multiple theories, it should not award damages for the same injuries twice. *See* 12/17/98 Tr. at 187-88.

conflicts with that of numerous other courts. *See* Pet. 18-21. Indeed, respondents do not argue otherwise.

Instead, respondents again argue that the issue was not preserved, again on the theory that petitioners' arguments below were "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice." Br. in Opp. 27. That objection again fails: petitioners unquestionably invoked *BMW*, and a central source of *BMW*'s holding is the Due Process Clause's notice requirement. *See supra*, p.4. Respondents also claim that petitioners waived their argument by submitting a proposed jury instruction on aiding and abetting. *See* Br. in Opp. 28. Even ignoring that this point covers only one-half of the notice problem in this case (notice that aiding-and-abetting liability might be imposed — not notice that an open-ended duty to maximize investment might be held to be consistent with the partnership agreement), it is wrong. Petitioners' consistent position at trial was that, as a matter of law, the corporate-parent petitioners could not be held liable for breach of fiduciary duty. *See* R. 577-81, 588-93, 16297-300, 16542-45. Petitioners can hardly be faulted for submitting a proposed instruction after the trial court rejected that position. Moreover, after the Court of Appeals created a new cause of action for aiding and abetting the breach of a fiduciary duty, petitioners protested at the first opportunity, in their petition for review in the Georgia Supreme Court (at 25-26).[7]

Next, respondents claim that, on the merits, they have the better argument. *See* Br. in Opp. 28-30. That is beside the

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[7] Respondents also rely (at 28) on the Court of Appeals' suggestion that petitioners failed to list the issue in their enumerations of error. That suggestion is simply puzzling. *See* Appellants' Enumeration of Errors No. 3 ("The trial court erred by failing to grant judgment in favor of the Non-Partner Defendants, which owed no fiduciary duty to Plaintiffs.").

point at the certiorari stage. Regardless, it is wrong. Insofar as respondents argue that pre-existing Georgia law *did* establish a cause of action for aiding and abetting a breach of a fiduciary duty, *see id.* at 29, they are at odds with the court below, which acknowledged that Georgia courts had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty," Pet. App. 13a. Although the Court of Appeals suggested that prior cases may have "implicitly acknowledged that such claims are viable" (*id.*), that is hardly enough to establish the point with the clarity needed to justify a punitive award in excess of a quarter billion dollars.[8] Insofar as respondents argue that the court interpreted the partnership agreement to require petitioners "to act 'in good faith as to the amount and type of capital improvements,'" Br. in Opp. 28 (quoting Pet. App. 16a), they miss the point entirely. The question here is not whether respondents' interpretation of the contract prevailed below — it is whether petitioners violated legal duties that were so clearly established as to render punitive damages appropriate.

3. The Petition explained that, even if the Court declines to grant plenary review on the issues discussed above, it should at least GVR in light of *Cooper*. *See* Pet. 22-24. That is so because, whereas the court below applied an exceedingly deferential standard of review to the trial court's *BMW* determination, this Court held in *Cooper* that *BMW*

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[8] *Cf. Lambrix v. Singletary*, 520 U.S. 518, 530 (1997) ("tentative expression" in prior opinion is not enough for *Teague* purposes). This is particularly so because, as the Court of Appeals acknowledged, *see* Pet. App. 13a, the Eleventh Circuit, hearing an appeal in a diversity case at roughly the time of petitioners' conduct, "decline[d] to extend aider and abettor liability to breaches of fiduciary duty concluding that Georgia courts would not recognize such a cause of action." *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604, 613 (11th Cir. 1996) (*per curiam*), *cert. denied*, 522 U.S. 1068 (1998).

determinations must be reviewed *de novo*. *See id.* Once again, respondents argue only that petitioners failed to preserve the issue, this time for three reasons. But respondents offer no convincing reason why the Court of Appeals should be deprived of an opportunity to reassess its judgment in light of the intervening authority.[9]

First, respondents argue that, to preserve the *Cooper* issue, it was incumbent upon petitioners to argue with great specificity that appellate courts are required to review *BMW* determinations *de novo*. *See* Br. in Opp. 15-20. But respondents do not deny that petitioners properly asked the Court of Appeals to review the trial court's *BMW* determination. *See supra*, p.2. That request necessarily encompassed a request that the Court of Appeals do so under

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[9] Respondents imply that this Court applies a more petitioner-friendly standard in connection with a stay than in connection with a GVR. *See* Br. in Opp. 2. The contrary is true. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (*per curiam*) ("the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard"); *see also Tyler v. Cain*, 121 S. Ct. 2478, 2484 n.6 (2001) (GVR is "not a final determination on the merits") (internal quotation marks omitted); *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (GVR appropriate where state-court decisions "are ambiguous as to whether they rest on state-law or federal-law grounds"); *Zant v. Moore*, 489 U.S. 836 (1989) (*per curiam*) (GVRing despite waiver claims). Moreover, if, as respondents claim (at 2, 12-13), petitioners' supposed waivers deprive this Court of jurisdiction, that would have been equally true in the stay context. Respondents err in relying on instances in which this Court denied certiorari after it had granted a stay. *See id.* at 2 n.2. Respondents overlook that, in each of those instances, the Court had granted a stay to allow the case to be "held" for a case already set for argument, and that the Court denied certiorari only when the case set for argument was resolved in a way unfavorable to the petitioner in the held case. That plainly is not so here.

the proper standard of review.[10] Moreover, petitioners urged that "[t]h[e] [Court of Appeals] reviews *de novo* rulings on questions of law," Br. in Opp. App. 16a, and *Cooper* itself teaches that a *BMW* determination is reviewed as a question of law.[11] In any event, the Court of Appeals passed on the standard of review, *see* Pet. 22, which by itself is sufficient to preserve the issue.[12]

Second, respondents argue that petitioners forfeited their *Cooper* argument when they appealed to the Court of Appeals instead of directly to the Georgia Supreme Court. *See* Br. in Opp. 20-22. This is so, respondents contend, because, while Georgia procedure mandates that "[a]ll cases involving the

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[10] *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995) ("a *prior* question" is necessarily preserved); *Missouri v. Jenkins*, 515 U.S. 70, 145 (1995) (Souter, J., dissenting) ("we have held that an issue is fairly comprehended in a question presented when the issue must be resolved in order to answer the question"); *United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (Court will not hold waived "an issue antecedent to . . . the dispute before it, even an issue the parties fail to identify and brief") (internal quotation marks omitted); *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (no waiver where question is "so connected with [the question raised] in substance as to form but another ground or reason for alleging the invalidity of the . . . judgment") (internal quotation marks omitted).

[11] *Cooper* also shows that respondents' waiver argument is wrong. In *Cooper*, too, the respondent argued that the petitioner had "never specifically identified for the [court below] the appropriate appellate standard of review for due process considerations." *Cooper* Br. in Opp. 7. The respondent pointed out that, other than including a blanket statement specifying the standard of review concerning "the erroneous award of punitive damages" (which the petitioner was challenging on state as well as federal grounds), the petitioner's brief did not argue that, or explain why, federal law required *BMW* determinations to be reviewed *de novo*. *See id.* at 7-8. This Court nevertheless granted the petition.

[12] *See, e.g., Lebron*, 513 U.S. at 379; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

construction of . . . the Constitution . . . of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question" be appealed to the state *Supreme Court*, petitioner appealed to the Court of Appeals even though their *Cooper* claim "would require a determination that the U.S. Constitution invalidated Georgia's well-established statute and caselaw mandating abuse-of-discretion review." *Id.* at 21-22 & n.20 (internal quotation marks omitted; ellipses in original). But the Georgia Supreme Court has held that appeals from *BMW* determinations are not within the scope of its exclusive jurisdiction.[13] Moreover, petitioners did not seek invalidation of any state statute: the statute in question, applicable to state-law excessiveness challenges, does not — and could not — dictate the standard of review applicable to *BMW* determinations. In any event, under Georgia law, an appeal to the wrong court results in a *transfer*, not a waiver.[14] Thus, in the end, respondents "wrong court" argument is simply a rehash of their mistaken claim that petitioners did not say enough to preserve the *Cooper* issue.

Finally, respondents contend (at 22-23) that petitioners forfeited the benefit of *Cooper* when their Court of Appeals brief said that the Court of Appeals "reviews for abuse of discretion rulings . . . for excessive damages." Br. in Opp. App. 16a. But that language referred to review of rulings on challenges to damages (punitive and compensatory) on state-law grounds. That is why petitioners cited *Lisle v. Willis*, 463 S.E.2d 108, 110 (Ga. 1995), which addressed the standard of review applicable to motions on state-law

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[13] *See General Motors Corp. v. Moseley*, No. S94A0122, Order (Ga. Jan. 5, 1994); *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994).

[14] *See, e.g., Atlanta Newspapers, Inc. v. Grimes*, 110 S.E.2d 343, 343 (Ga. 1959).

grounds. As already explained, *see supra*, p.8, petitioners also urged the Court of Appeals to "revie[w] *de novo* rulings on questions of law," Br. in Opp. App. 16a, which amply covered their request for review of the trial court's *BMW* determination. In sum, respondents' suggestion that petitioners invited error lacks merit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EVAN R. CHESLER
KEITH R. HUMMEL
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

DAVID M. HEILBRON
FRANK M. HINMAN
JASON M. COHEN
MCCUTCHEN, DOYLE, BROWN & ENERSON
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

WALT M. BRITT
CHANDLER & BRITT, LLC
4350 South Lee Street
Buford, GA 30518
(770) 271-2991

HENK BRANDS
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

HAROLD G. CLARKE
NORMAN L. UNDERWOOD
JOHN J. DALTON
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Petitioners

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